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No. 05-431 SEP 8 2005

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In The

Supreme Court Of The United States

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act entitled to judicial deference?

2. Do the provisions of the National Bank Act and the regulations promulgated thereunder by the Office of Comptroller of the Currency preempt state law licensing and regulatory authority over state-chartered operating subsidiaries of national banks?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Second Circuit, which is the court whose judgment is sought to be reviewed, were Wachovia Bank, N.A. (plaintiff-appellee), Wachovia Mortgage Corporation (plaintiff-appellee), and John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut (defendant-appellant).

The following participated as *amicus curiae*: Office of the Comptroller of the Currency; American Bankers Association, America's Community Bankers, Consumer Bankers Association, Consumer Mortgage Coalition, Financial Services Roundtable, New England Legal Foundation, North American Securities Administrators Association, Inc., Conference of State Bank Supervisors, and Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

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WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut, respectfully prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on July 11, 2005.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), and is reprinted in the Appendix hereto at A1 - A31.

The memorandum of decision of the United States District Court for the District of Connecticut is reported at *Wachovia Bank v. Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004), and is reprinted in the Appendix hereto at A32 – A56.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 11, 2005. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

Article VI of the U.S. Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 484(a) of the National Bank Act (12 U.S.C. § 484(a)) provides:

> No national bank shall be subject to any visitorial power except as authorized by Federal law, vested in the courts of justice or such as shall be, or shall have been exercised or directed by Congress or of either House duly authorized.

Section 24(Seventh) of the National Bank Act (12 U.S.C. § 24(Seventh)) provides, in pertinent part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –
>
> * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking. . . .

Section 371(a) of the National Bank Act (12 U.S.C. § 371(a)), provides, in pertinent part:

> Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Section 221a of the National Bank Act (12 U.S.C. § 221a) provides, in pertinent part:

> As used in this chapter -
>
> * * *
>
> (b) Except where otherwise specifically provided, the term "affiliate" shall include any corporation, business trust, association, or other similar organization -

(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank; or

(4) Which owns or controls, directly or indirectly, either a majority of the shares of capital stock of a member bank or more than 50 per centum of the number of shares voted for the election of directors of a member bank at the preceding election, or controls in any manner the election of a majority of the directors of a member bank, or for the benefit of whose shareholders or members all or substantially all the capital stock of a member bank is held by trustees.

Section 7.4006 of Title 12 of the Code of Federal Regulations provides:

> Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank

operating subsidiaries to the same extent that those laws apply to the parent national bank.

STATEMENT OF THE CASE

This case involves an effort to divest States of their traditional authority to license and regulate state-chartered mortgage lenders. Under the guise of a regulation purporting to define the scope of preemption of state law's application to national banks, the Office of the Comptroller of the Currency ("OCC") and the national banks it regulates have joined forces to undermine state authority to protect the public from abusive mortgage lending practices.

The plaintiffs' complaint sought to enjoin the defendant from enforcing Connecticut's laws regulating the business of first and secondary mortgage loans against the plaintiff Wachovia Mortgage Corporation ("Wachovia Mortgage"), an operating subsidiary of the plaintiff, Wachovia Bank, N.A. ("Wachovia Bank"). These laws are designed principally to ensure the protection of consumers. The plaintiffs maintain that Wachovia Mortgage, a state-chartered corporation, is exempted from these state licensing and regulatory laws for the sole reason that it is owned by a nationally chartered bank. Although Congress has expressly preempted certain state authority over nationally chartered banks, it has not done so with regard to their operating subsidiaries, which remain creatures of state law.

The District Court had jurisdiction over this action pursuant to *28 U.S.C. § 1331* inasmuch as the plaintiffs alleged claims arising under the U.S. Constitution and federal law.

The defendant John P. Burke is the Banking Commissioner of the State of Connecticut ("Commissioner") and was sued in his official capacity. Under Connecticut law, the Commissioner has authority to administer and enforce the banking laws of the State. Conn. Gen. Stat. title 36a.

Connecticut's banking laws require that, with certain specified exceptions, any entity engaged in the business of making first or secondary mortgage loans[1] be licensed and subject to the Commissioner's regulatory authority. *See* Conn. Gen. Stat. § 36a-1. Specifically, § 36a-486 of the Connecticut General Statutes provides:

> No person shall engage in the business of making first mortgage loans or act as a first mortgage broker in this state unless such person has first obtained the required license in accordance with the provisions of sections 36a-485 to 36a-498, inclusive.[2]

Similarly, § 36a-511 of the General Statutes provides:

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[1] A first mortgage loan is defined under Connecticut law as a loan made primarily for personal or family purposes that is secured by a first mortgage on residential real property. Conn. Gen. Stat. § 36a-485(6). A secondary mortgage loan is defined as a loan made primarily for personal or family purposes secured by a mortgage on residential property that is already subject to one or more prior mortgages. Conn. Gen. Stat. § 36a-510(10).

[2] Sections 36a-485 to 36a-498 set forth various aspects of the first mortgage licensing process, including exemptions, applications, denials, fees, bonds, and revocations.

> No person shall engage in the business of making secondary mortgage loans or act as a secondary mortgage broker unless such person has first obtained the required license under sections 36a-510 to 36a-524, inclusive.[3]

A national bank is exempted from the licensing requirements of §§ 36a-486 and 36a-511, but a subsidiary of a national bank is expressly not exempted. Conn. Gen. Stat. §§ 36a-487(1), 36a-512(4).

A first or secondary mortgage licensee is required to maintain adequate records of its mortgage loan activities and to make such records available to the Commissioner upon request. Conn. Gen. Stat. §§ 36a-493, 36a-516. The Commissioner may, after notice and hearing, suspend, revoke, or refuse to renew a license for, among other reasons, fraud, misappropriation, or violations of the banking laws. Conn. Gen. Stat. §§ 36a-51, 36a-494, 36a-517. The Commissioner is further authorized to take appropriate measures to enforce the banking laws, including the imposition of civil penalties, issuance of cease-and-desist orders, and the institution of superior court actions for injunctive relief. Conn. Gen. Stat. §§ 36a-50, 36a-52.

Wachovia Bank is a national banking association chartered under the National Bank Act. Wachovia Mortgage, a wholly owned subsidiary of Wachovia Bank, is a corporation incorporated under the laws of the State of North Carolina. Wachovia Mortgage is engaged, or intends to be engaged, in the business of making first and secondary mortgage loans in the State of Connecticut.

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[3] Sections 36a-510 to 36a-524 similarly set forth various aspects of the secondary mortgage licensing process.

Wachovia Bank is exempt from the licensing requirements of §§ 36a-486 and 36a-511, but Wachovia Mortgage must obtain licenses to conduct first and secondary mortgage lending in Connecticut.

The plaintiffs initiated this action in district court, seeking declaratory and injunctive relief. They alleged (1) that the defendant's authority under state law to license and regulate Wachovia Mortgage is preempted by the National Bank Act, 12 U.S.C. § 484, and the regulations promulgated by the OCC, the federal agency that regulates national banks; and (2) that the enforcement of such state laws violated the plaintiffs' federal rights under the National Bank Act, giving rise to an action under 42 U.S.C. § 1983.

The relevant facts are undisputed, and the matter was heard by the district court on cross-motions for summary judgment. The parties agree that Wachovia Mortgage intends to engage in the business of making of first and secondary mortgage loans, and that the Commissioner intends to enforce the requirements of Connecticut law regarding licensure against Wachovia Mortgage.

The plaintiffs claimed that federal law, and in particular 12 C.F.R. § 7.4006, preempts the defendant from enforcing state licensing and regulatory authority over Wachovia Mortgage. Section 7.4006 purports to extend 12 U.S.C. § 484, which prohibits state officials from exercising "visitorial powers" over national banks, to the operating subsidiaries of national banks. The defendant contended that the National Bank Act, pursuant to which § 7.4006 was promulgated, does not, and can not be reasonably interpreted, to extend the limitation on state visitorial powers under § 484 of the National Bank Act to

state-chartered non-bank operating subsidiaries of national banks. The defendant further contended that the plaintiffs' preemption claim does not provide a basis for a § 1983 claim.

The district court granted summary judgment in favor of both plaintiffs as to the preemption claim and in favor of Wachovia Bank as to the § 1983 claim. *Wachovia Bank v. Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004) (App. at A32).

On appeal, the court of appeals affirmed the judgment of the district court as to the preemption claim, but reversed on the § 1983 claim. The Second Circuit held that the OCC's view of the scope of the National Bank Act's preemption, as reflected in 12 C.F.R. § 7.4006, was reviewable under the deferential standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and under that standard was reasonable. The Second Circuit reversed the district court on the § 1983 claim, concluding that the National Bank Act did not create an enforceable federal right to be free of state regulation. *Wachovia Bank v. Burke*, 414 F.3d 305 (2d Cir. 2005) (App. at A1).

REASONS FOR GRANTING THE WRIT

A conflict now exists among the circuit courts of appeals on the question of according judicial deference to an administrative agency's interpretation of the preemptive effect of a statute. Deferring to an agency's view of preemption, as the Second Circuit did in this case, has been expressly rejected by the Tenth and Eleventh Circuits. This split on such a fundamental question implicating the exercise of state law authority deserves this Court's resolution.

Moreover, the preemption question presented is not of mere doctrinal interest. Instead, the states' ability to regulate mortgage lending and, in particular, to protect the public from predatory and abusive lending practices, is at stake. The Second Circuit's erroneous acceptance of the OCC's view of preemption, if left to stand, will seriously impair and undermine state law protections of home mortgage borrowers against the growing and potentially ruinous problem of predatory lending.[4]

I. THE SECOND CIRCUIT'S DECISION TO AFFORD DEFERENCE TO THE OCC'S VIEW OF PREEMPTION OF STATE LAW IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The OCC's view that federal preemption under the National Bank Act extends to national bank's operating subsidiaries is a classic legal question about the scope of the agency's preemptive authority. Unlike the Second Circuit, which deferred to the OCC, other circuits have refused to grant judicial deference to an agency's view on

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[4] This issue of preemption of state law authority over the operating subsidiaries of national banks is also raised in pending litigation in three other circuits. *See Wells Fargo N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005) (holding that the OCC's visitorial authority over national banks' operating subsidiaries preempted state authority under a deferential standard of review); *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004) (same), *appeal pending*, No. 04-2257 (6th Cir.); *National City Bank of Ind. v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) (same), *appeal pending*, No. 05-1647 (4th Cir.).

the fundamental matter of preemption. A conflict among the circuits thus exists that this Court needs to resolve.

In concluding that state law authority over the operating subsidiaries of national banks is preempted, the Second Circuit accepted the OCC's interpretation, rather than deciding for itself whether Congress had intended to oust state regulation. Applying the deferential standard of review of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Second Circuit evaluated only whether the OCC's view was reasonable. *Wachovia Bank*, 414 F.3d at 318 (App. at A-20).

Two other courts of appeals – the Tenth Circuit and the Eleventh Circuit – have explicitly rejected providing deferential review of an agency's opinion of federal preemption. Most recently, in *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), the Eleventh Circuit Court of Appeals dismissed the notion that any judicial deference should be paid an agency's view of the preemptive effect of a statute. *Id.* at 1301 ("[W]e do not defer to agency positions, whether formal or informal, on preemptive issues."). Quoting from an earlier decision of the Tenth Circuit Court of Appeals, the *BankWest* court explained that "[b]ecause 'a preemption determination involves matters . . . more within the expertise of the courts than within the expertise of an administrative agency, we need not defer to an agency's opinion regarding preemption." *Id.* (quoting *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (holding no deference to agency view of preemption)).

This Court has expressly left open the question whether judicial deference should be accorded an agency

opinion on preemption.[5] In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court noted the distinction between an agency's interpretation of the substantive meaning of a statute, which may receive judicial deference, and the interpretation of the preemptive effect of a statute. *Id.* at 744. Because the provision at issue in *Smiley* clearly preempted state law, the Court stated "[w]e may assume (without deciding) that the latter question must always be decided de novo by the courts." *Id.*

"[I]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As this Court emphasized in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986):

> [A] federal agency may pre-empt state law only when it is acting within the scope of congressionally delegated authority. . . . [A]n agency literally has no power to act, let alone pre-empt validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.

Id. at 374. Thus, a "precondition" to judicial deference is a congressional delegation of authority to the agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

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[5] In *NationsBank of North Carolina v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), the Court gave deference to the OCC's opinion that the sale of annuities was an incidental power to the business of banking under the National Bank Act. The OCC's opinion to which the Court deferred involved the substantive meaning of a statute, not its preemptive effect.

It follows, therefore, if Congress did not intend for an agency to have authority over a subject matter, there can be no deference to an agency's interpretation that it has such authority and that state law is preempted. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374. "[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Id.*; *accord New York v. FERC*, 535 U.S. 1, 18 (2002).

Deferring to an agency's view of the preemptive effect of a purported grant of statutory authority creates a classic logic trap. A court must first decide whether Congress has delegated authority to the agency. If *Chevron* or another doctrine of deference applies to questions of preemption, then the court must defer to the agency's reasonable interpretation. Yet, if the agency has exceeded its authority, no deference is due. The only way out of this circular trail of reasoning is to deny judicial deference to an agency's view of its own preemptive authority. *See Adams Fruit*, 494 U.S. at 650 ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

When § 7.4006 was adopted, the OCC expressly disavowed any preemptive effect of the regulation. It stated that the regulation "itself does not effect preemption of any State law; it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and

applicable Federal judicial precedent." 66 Fed. Reg. 34784, 34790 (July 2, 2001).

Ironically, the OCC has insisted that the courts must nonetheless defer to what is nothing more than its view of the result that a federal court should reach. However, courts should not defer to an agency's interpretation of judicial decisions. *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). According deference to an agency's interpretation of how it thinks a court would interpret the scope of the agency's preemptive authority is the ultimate administrative bootstrap.

Moreover, there are good reasons for courts to be wary of an agency's interpretation of the extent of its own preemptive power. It is hardly a novel observation that agencies tend to have "an expansive view of their mission." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981). The dangers of agency self-interest and aggrandizement warrant unfettered judicial review of an agency's scope of preemptive authority. *See* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1008-09 (1999) ("[A]gencies have no comparative advantage in reading statutes, and . . . agency self-interest may cloud its judgment."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1024 (1992) ("[T]he decision to regulate may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy."); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORN. J.L. & PUB. POLICY 203, 210-11 (2004).

The OCC, for example, has institutional interests in pushing the preemption envelope. Almost its entire budget

is funded by assessments paid by national banks. Extending preemption ever further creates an incentive for financial entities under state authority to seek a national charter, which in turn results in an expansion of the OCC's realm. *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 72-74 (2005). Thus, OCC has a definite self-interest in obtaining the broadest possible sweep for national bank preemption. *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANK & FIN. L. 225, 232 (2004). Courts must act as the brake against such accretion of federal power at the expense of state authority.

This Court should grant certiorari to resolve the conflict among the circuits as to whether judicial deference to agency interpretations of the preemption of state law is appropriate.

II. THE ISSUE OF PREEMPTION OF STATE AUTHORITY OVER OPERATING SUBSIDIARIES OF NATIONAL BANKS IS A MATTER OF SERIOUS IMPORTANCE TO THE STATES AND WAS ERRONEOUSLY DECIDED BY THE SECOND CIRCUIT

The regulation of operating subsidiaries engaged on residential mortgage lending is a matter of vital importance to states. The scourge of predatory language has grown dramatically in recent years, and states must have the ability to regulate operating subsidiaries to respond effectively to this serious problem. By erroneously accepting the OCC's view of preemption, the Second

Circuit will have hamstrung states in their efforts to protect consumers.

A. State Regulation of Mortgage Lenders Seeks to Protect Consumers from Abusive Practices and Represents a Matter of Vital Public Importance.

The stakes are high in this case for states and the public they protect. Consumers will suffer serious harm, and the states' interests in protecting their citizens will be seriously impaired, if operating subsidiaries of national banks are permitted to engage in first and secondary mortgage lending without being licensed, examined and regulated by the states for such activities. Like similar statutes of other states,[6] Connecticut's statutes governing first and secondary mortgage lending "aim[] to protect consumers by prohibiting certain unscrupulous lending practices." *Solomon v. Gilmore*, 248 Conn. 769, 776-77, 731 A.2d 280 (1999). As Congress has recognized:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, ***regardless of the type of charter an institution holds***. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities.

House-Senate Conf. Comm. Report on Riegle-Neal Interstate Banking Act, H.R. Rep. 103-651, at 53, *reprinted*

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[6] *E.g.*, Cal. Fin. Code §§ 50000 – 50510; Fla. Stat. §§ 494.001 – 494.00797; Mass. Gen. L. ch. 183c, §§ 1 – 19; Mich. Comp. L. §§ 445.1651 – 445.1684; N.J. Stat. §§ 17:11C-1 to 17:11C-49; N.C. Gen. Stat. §§ 53-243.01 to 53.243.16.

in 1994 U.S. Code Cong. & Admin. News 2068, 2074 (emphasis added); *see Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980) ("[B]oth as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern.").

The states' interests in protecting consumers in the area of mortgage lending is vital, especially with regard to predatory lending and other deceptive and abusive lending practices. Predatory lending consists of a variety of unfair and deceptive lending practices that strip borrowers of the equity in their homes and often place them at risk of foreclosure and financial ruin. Such practices include excessive and undisclosed fees and closing costs, asset-based lending (loans based on equity in the mortgaged property rather than the borrower's ability to repay), repeated refinancing with high fees (known as "flipping"), imposition of prepayment penalties, and higher interest rates at closing than had been promised. *See* U.S. GENERAL ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 18-20 (Jan. 2004) ("GAO REPORT").

Predatory lending has grown dramatically with the explosion of subprime mortgage lending. Subprime lending generally refers to loans made to borrowers with impaired credit histories or high debt-to-income ratios and are therefore unable to qualify for traditional mortgage loans. Subprime lending has grown exponentially since the 1990s, and with it has grown the potential for abusive practices. *See* Remarks of Edward M. Gramlich, Federal Reserve Board, *Subprime Mortgage Lending: Benefits, Costs, and Challenges* (May 21, 2004) (available at www.federalreserve.gov/boarddocs/speeches/2004/20040522/default.htm). Operating subsidiaries of banks make up a

substantial portion of the subprime market. *See* GAO REPORT, *supra*, at 21-22; Wilmarth, *supra*, at 314-16.

Connecticut's laws provide benefits and protections for consumers not found in federal law. These include standards for licensure, Conn. Gen. Stat. §§ 36a-488, 36a-513; advance fee disclosures, *id.* § 36a-498; various mortgage-related consumer protection disclosures, *id.* § 36a-492, 49-5b, 49-6a, 49-6c, 49-6d; rate lock-in agreements, *id.* §§ 36a-705 to 36a-707; bond requirements, *id.* § 36a-492; prohibition on prepayment penalties, *id.* § 36a-519; prohibited provisions in mortgages, *id.* § 36a-746c; prohibited acts by lenders, *id.* § 36a-746e; prohibitions related to title, flood and fire insurance, *id.* §§ 36a-756, 36a-757; obligations on lenders related to mortgage servicing, *id.* §§ 36a-716, 36a-717; restrictions on advertising, *id.* §§ 36a-497, 36a-524; availability of appraisals to borrower, *id.* § 36a-755; and limits on prepaid finance charges, *id.* §§ 36a-498a, 36a-521, 36a-746a.[7]

Until the OCC issued § 7.4006 to preempt the application of state law to operating subsidiaries, the states licensed and regulated such entities under the kinds of laws described above. The OCC has allowed national banks to use operating subsidiaries since the promulgation of 12 C.F.R. § 5.34 in 1966. 31 Fed. Reg. 11,459 (Aug. 31, 1966). However, the OCC did not issue its preemption rule in § 7.4006 until some 35 years later in 2001.[8] Thus, the OCC's preemption rule is hardly one of longstanding; instead, it seeks to eliminate the traditional regulatory authority of the states.

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[7] Other states have similar laws. *See supra* note 6.

[8] Indeed, Wachovia Mortgage did not attempt to surrender its state license until late 2002, after the issuance of § 7.4006.

Preempting the application of state banking laws to operating subsidiaries of national banks will deprive the public of the panoply of consumer protections that are currently afforded by state law. This is in part the result of the OCC's adoption in 2004 of regulations purporting to define the scope of National Bank Act preemption generally. These regulations broadly preempt state law's application to national banks, excepting only those state laws that "incidentally" affect bank operations, such as generally applicable laws relating to contracts, torts, criminal law, debt collection, acquisition and transfer of property, taxation, and zoning. 12 C.F.R. §§ 7.4007 to 7.4009. Under these rules, states are preempted from enforcing against national banks a variety of laws designed to protect consumers with regard to, among other things, loan terms, fees, and disclosures. *Id.* By force of § 7.4006 – the regulation at issue here – this preemption would apply to the operating subsidiaries of national banks.

In addition to the added protections for consumers under state law, state banking regulators, because they have a local presence and, therefore, are more accessible to consumers, are in a better position than the OCC to assess and address such problems and assist consumers in their states. *See* GAO Report, at 10, 58-69 (discussing state efforts to combat predatory lending). By contrast, as one commentator recently concluded:

> Public policy does not favor entrusting the OCC with sole discretion and authority to enforce consumer protections laws against national banks and their operating subsidiaries. Virtually the entire OCC budget is funded by fees and assessments paid by national banks. The OCC therefore has an obvious self-interest in pursuing a preemption

> agenda that will encourage large, multistate banks to operate under national charters. In addition, during the past decade the OCC has not initiated a single public prosecution of a major national bank for violating a consumer protection law. The OCC's unimpressive enforcement record is, unfortunately, consistent with its strong budgetary interest in maintaining the loyalty of leading national banks. Given the OCC's financial self-interest and its empire-building agenda, the OCC faces a clear conflict of interests (and the risk of regulatory capture) whenever the agency considers the desirability of (i) preempting state consumer protection laws or (ii) taking vigorous enforcement measures against one of its most important constituents.

Wilmarth, *supra*, at 232; *see also* Peterson, *supra*, at 69-74, 77-84 (discussing the OCC's aggressive support of national banks in the banks' litigation against state regulators, its lax consumer protection regulation, and incentives created thereby for migration to national charters).

The OCC deserves no deference in its interpretation of the National Bank Act's preemption of state authority over state-chartered operating subsidiaries. The OCC's interpretation of the National Bank Act does not represent a reasonable weighing of competing policy concerns that Congress left to the agency to resolve. Instead, it represents a naked assault on the traditional authority of states to regulate state-chartered mortgage lenders. It is part of a comprehensive effort by the OCC and its regulated constituency to deprive the states of their ability to protect consumers.

B. The Second Circuit Erroneously Accepted OCC's Expansion of the National Bank Act's Preemption to Operating Subsidiaries.

In 2001, the OCC issued a new regulation that purports to extend the full reach of preemption under the National Bank Act to the operating subsidiaries of national banks.[9] 66 Fed. Reg. 34784 (July 2, 2001). Section 7.4006 of the OCC's rules provides: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

We begin from a basic proposition: "The rulemaking power granted to an administrative agency . . . is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Santa Fe Industries v. Green*, 430 U.S. 462, 472-73 (1977) (internal quotations omitted). Although agency regulations can have preemptive effect, *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), preemption remains a question of ***congressional***, not agency, intent. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996).

1. The OCC's Interpretation of the Scope of the National Bank Act's Preemption Does Not Satisfy the Requirements for Deference Under the *Chevron* Doctrine.

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[9] Section 7.4006 came thirty-five years after the OCC first promulgated a regulation in 1966 that permits national banks to use operating subsidiaries. *See* 12 C.F.R. § 5.34; 31 Fed. Reg. 11,459 (Aug. 31, 1966).

Wrongly applying the deferential standard of review of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Second Circuit acceded to the OCC's overreaching effort to block state regulatory authority. In *Chevron*, this Court directed:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

For purposes of the *Chevron* analysis, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Thus, answering the question whether Congress has specifically addressed the question is an ordinary exercise of statutory construction, and if an unambiguous intent is demonstrated through the application of the rules of statutory construction, then a contrary construction by an

administrative agency is not entitled to deference. *Id.* at 132-33. Moreover, a reviewing court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133.

With these principles in mind, it is apparent that Congress has addressed the question. It simply has not chosen to extend the preemptive scope of the National Bank Act as far as the OCC would have liked.

a. Section 484 Only Preempts State Visitorial Authority as to National Banks Themselves, and Operating Subsidiaries Are Not National Banks.

Congress limited state authority over national banks in § 484 of the National Bank Act, which provides:

> No ***national bank*** shall be subject to any visitorial power except as authorized by Federal law, vested in the courts of justice or such as shall be, or shall have been exercised or directed by Congress or of either House duly authorized.

12 U.S.C. § 484(a) (emphasis added).[10] Section 484 thus precludes the exercise of visitorial authority by a state only as to a ***national bank***. The Commissioner, however, does not seek to exercise visitorial authority over a national

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[10] The OCC has defined visitorial powers to include bank examinations, inspection of books and records, regulation and supervision of banking activities, and enforcing compliance with any applicable federal or state law concerning those activities. 12 C.F.R. § 7.4000(a)(2).

bank. Instead, he seeks to exercise his state law authority over a state-chartered corporation. The simple fact is operating subsidiaries of national banks, such as Wachovia Mortgage, are separate state-chartered entities and are ***not*** national banks.

The term "national bank" in § 484 cannot be construed to include implicitly a national bank's operating subsidiaries. Under the National Bank Act, a national bank is a financial institution that has received a certificate of authority from the OCC to engage in the business of banking. 12 U.S.C. §§ 26, 27, 221, 221a. Obviously, Wachovia Mortgage does not satisfy that definition. Wachovia Mortgage does not have a national charter; it is incorporated under the laws of North Carolina. In this regard, it is no different than the thousands of other corporations doing business in the State of Connecticut that are incorporated under the laws of a state. Even as a wholly owned subsidiary of a national bank, Wachovia Mortgage remains a creature of state law and is not a national bank within the meaning of § 484. Nothing in the otherwise plain and unambiguous language of § 484 even hints that Congress contemplated extending the limitations on visitorial powers contained in that provision to state-chartered subsidiaries.

The National Bank Act separately defines an "affiliate" of a national bank as including a corporation owned or controlled by a national bank. 12 U.S.C. § 221a(b). Plainly, under this definition, Wachovia Mortgage is an affiliate of Wachovia Bank.

Under 12 U.S.C. § 481, the OCC may examine affiliates (including operating subsidiaries) of national banks. However, Congress has ***not*** given the OCC ***exclusive*** visitorial powers over such affiliates. The fact

that Congress chose not to include the term affiliate in § 484, when it has separately defined such entities, but instead gave the OCC nonexclusive authority over such affiliates, demonstrates that § 484 was not intended to have preemptive power beyond national banks themselves.

b. The National Bank Act's Grant of "Incidental" Powers Does Not Preempt the Commissioner's Authority Over Wachovia Mortgage.

The plaintiffs and the OCC have maintained that a national bank's incidental powers under § 24(Seventh), coupled with a national bank's authority to engage in real estate lending under § 371(a), preempts the Commissioner's authority. The Second Circuit deferred to the OCC view. *Wachovia Bank v. Burke*, 414 F.3d at 319-20 (App. at A22-A23). These provisions grant national banks certain powers. They do not evidence congressional intent to restrict a state's authority over a state-chartered subsidiary.

Section 24(Seventh) of the National Bank Act provides, in pertinent part, that national banks shall have "all such incidental powers as shall be necessary to carry on the business of banking. . . ." 12 U.S.C. § 24(Seventh). Section 371(a) provides that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 18(o) of the Federal Deposit Insurance Act and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Like § 484, these provisions speak only to national banks and not to their operating subsidiaries.

The plaintiffs seek to blur the question of a national bank's authority to have operating subsidiaries and the question of the regulatory authority over such operating subsidiaries. However, that a national bank may have as one of its "incidental" powers under § 24(Seventh) of the National Bank Act the power to use an operating subsidiary in the mortgage lending business does not of itself resolve the issue of preemption. Similarly, the fact that a national bank may engage in mortgage lending under § 371(a) does not itself free the bank's operating subsidiaries from state regulation.

It simply does not follow that, if a national bank has the authority to have a wholly owned subsidiary engaged in a form of business that the national bank itself could conduct, the subsidiary is necessarily exempted from state regulation. The question of preemption of state law must be decided separately and with reference to Congress' intent under the National Bank Act. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

Although the power to own an operating subsidiary that engages in the mortgage lending business may be an incidental power granted by § 24(Seventh), that does not by any means infer that state authority over that subsidiary is preempted. If the mere grant of power to a national bank were sufficient to preempt state authority, there would be no need for Congress to have enacted § 484. Therefore, this general grant of authority cannot provide the evidence of congressional intent that is necessary for the preemption of state law.

In sum, as a matter of straight forward statutory construction, the National Bank Act only preempts state authority to regulate a national bank itself, and not operating subsidiaries of a national bank.

2. The Rationale Underlying § 7.4006 Reflects An Unreasonable Interpretation of the Provisions of the National Bank Act.

Even assuming that deferential review is appropriate under *Chevron*, the Second Circuit wrongly concluded that the OCC's view articulated in § 7.4006 is a reasonable interpretation of the National Bank Act's provisions. An examination of the OCC's attempted rationale for preemption exposes its illogic and inconsistency with congressional intent.

In adopting § 7.4006, the OCC paradoxically concluded that "operating subsidiaries are, in essence, incorporated departments or divisions of the bank. . . ." 66 Fed. Reg. 34784, 34788 (July 2, 2001). In other words, in the OCC's eyes, the state-chartered operating subsidiary is not a separate legal entity after all, but a mere department or division of the national bank. This depiction of operating subsidiaries as just another department or division of the bank runs counter to every basic principle of corporation law. It remains a "basic tenet of American corporation law" that a parent and its subsidiary corporations are distinct legal entities. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003); *accord United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). To overcome this bedrock rule the OCC needs something more than *ipse dixit*.

If the subsidiary is "in essence" a department or division, why then is it separately incorporated under state law? The answer, of course, is that a separate corporate existence is advantageous from a business perspective. Using operating subsidiaries for the mortgage lending

business protects the national bank's deposit base from exposure to liability arising from mortgage lending activities. This explains why national banks choose to incur the substantial costs involved in setting up and maintaining separate state-chartered corporations to carry on a business that could be conducted directly by the parent national banks.

Thus, the very reason that a national bank would choose to have an operating subsidiary engaged in mortgage lending is to take advantage of the shielding from liability that comes with the corporate separation inherent in the parent-subsidiary relationship. Without that separateness, the value of having an operating subsidiary involved in mortgage lending would be greatly diminished.

The plaintiffs and the OCC would have their proverbial cake and eat it too. Certainly, they do not mean to say that operating subsidiaries are in fact mere departments or divisions. If that were so, they would lose the benefits of corporate separateness. Yet, when it is to their advantage, the plaintiffs and the OCC characterize operating subsidiaries as akin to a department or division, lacking a separate corporate identity.

Although the law sometimes overlooks the separate existence of commonly controlled corporations, ignoring the fundamental tenet of corporate separateness in this instance cannot be justified. The very reason that national banks desire to use operating subsidiaries is the significant risk reduction benefits that come with corporate separateness. Thus, it is patently unreasonable to characterize operating subsidiaries as nothing more than a division of department of its parent national bank. If that characterization holds, the operating subsidiary loses the

very thing that makes it an attractive way of structuring the national bank's business.

This is not simply a matter of the law treating an entity differently for different purposes; this is one and the same purpose, and it ought to be treated in the same way. If a national bank has the authority as an incidental power to use operating subsidiaries, and thereby to take advantage of the protections from liability that corporate separateness brings, then the separate corporate identity of the operating subsidiary ought to be recognized and not mischaracterized as something else.

Therefore, even assuming that the OCC is entitled to judicial deference, which on this question it is not, its view of the scope of preemption represented in § 7.4006 is not reasonable and the Second Circuit erred in accepting it.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Petition should be granted and a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETITIONER,
JOHN P. BURKE, in his official capacity as Banking Commissioner of the State of Connecticut

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No. _____

In The

Supreme Court Of The United States

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004
(Argued: May 31, 2005 Decided: July 11, 2005)

Docket No. 04-3770-cv

WACHOVIA BANK, N.A. AND WACHOVIA MORTGAGE CORPORATION,
Plaintiffs-Appellees,

—v.—

JOHN P. BURKE, IN HIS OFFICIAL CAPACITY AS BANKING COMMISSIONER OF THE STATE OF CONNECTICUT,
Defendant-Appellant.

Before:

MCLAUGHLIN, STRAUB, AND HALL, *Circuit Judges*.

Appeal from a final judgment of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*), which held that the National Bank Act and regulations promulgated by the Office of the Comptroller of the Currency preempt the application of certain Connecticut banking laws to Wachovia Mortgage Corporation, an operating subsidiary of Wachovia Bank, N.A., a national bank. The District Court further found that the National Bank Act provides national banks with federal

rights and that Connecticut's attempt to regulate Wachovia Bank's operating subsidiary gave rise to an action under 42 U.S.C. § 1983. We agree that federal law preempts state regulation of a national bank operating subsidiary to the same extent that it preempts regulation of the parent national bank. We find, however, that the National Bank Act does not provide national banks with rights enforceable under § 1983.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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Douglas B. Jordan, Counsel for the Office of the Comptroller of the Currency (Daniel P. Stipano, Acting Chief Counsel; Horace G. Sneed, Director of Litigation, *on the brief*), Washington, D.C., *for the Office of the Comptroller of the Currency as amicus curiae in support of Appellees*.

Frederick C. Schafrick, Goodwin Procter LLP

(Thomas M. Hefferon, Goodwin Procter LLP; Joseph M. Kolar, Jeremiah S. Buckley, Buckley Kolar LLP, *on the brief*), Washington, D.C., *for the American Bankers Association, America's Community Bankers, Consumer Bankers Association, Consumer Mortgage Coalition, and Financial Services Roundtable as amici curiae in support of Appellees.*

STRAUB, *Circuit Judge*:

Defendant-Appellant John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut ("the Commissioner"), appeals from a decision of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*) granting summary judgment in favor of Plaintiffs-Appellees Wachovia Bank, N.A. ("Wachovia Bank"), a nationally chartered bank, and its wholly owned, state-chartered subsidiary Wachovia Mortgage Corporation ("Wachovia Mortgage") (together "Wachovia"). The plaintiffs brought an action for declaratory and injunctive relief to prevent enforcement of certain Connecticut banking laws against Wachovia Mortgage on the ground that the state laws are preempted by the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq.*, and regulations issued by the Office of the Comptroller of the Currency ("OCC"). The plaintiffs also asserted claims under 42 U.S.C. § 1983 for violation of rights allegedly provided by the NBA. On cross-motions for summary judgment, the District Court found that OCC regulations preempt the application of the state laws to Wachovia Mortgage. *Wachovia Bank, N.A. v. Burke*, 319 F. Supp. 2d 275, 281-88 (D. Conn. 2004). It further held that the NBA provided Wachovia Bank with rights enforceable under 42 U.S.C. § 1983 but that the NBA provided no such rights to

Wachovia Mortgage. *Id.* at 288-90.

The precise preemption issue is whether the NBA and OCC regulations preempt state banking laws concerning operating subsidiaries of nationally chartered banks. No court of appeals has addressed this issue, although several district courts have done so and have reached the same conclusion as the District Court in this case. We agree with the finding of preemption in this case. The NBA grants powers to national banks, including "incidental powers" necessary to carry on the business of banking, *see* 12 U.S.C. § 24 (Seventh), and it provides that national banks, in the exercise of their powers, shall be free from state "visitorial" power, *see* 12 U.S.C. § 484. The OCC, meanwhile, has issued regulations allowing national banks to conduct business through an operating subsidiary, *see* 12 C.F.R. § 5.34(e), and providing that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank," 12 C.F.R. § 7.4006. These regulations define a national bank's "incidental powers" to include conducting business through an operating subsidiary, and they preempt state visitorial power over operating subsidiaries to enable national banks to exercise this incidental power. We defer to these regulations because they are reasonable and within the OCC's authority under the NBA.

We must, however, reverse the District Court's holding with respect to Wachovia Bank's claim under 42 U.S.C. § 1983. Although the key provision, 12 U.S.C. § 484, prevents states from infringing on the power of national banks, the NBA focuses on national banks as federal instrumentalities empowered as part of a national banking system to the benefit of the national economy as a whole. There is no clear intent to benefit national banks as private entities with individual rights, and the powers

granted to national banks simply operate to establish federal regulatory authority vis-à-vis the states.

BACKGROUND

The following facts are not in dispute. Connecticut has enacted a series of banking laws with enforcement power delegated to the Commissioner. As explained by the District Court, six Connecticut banking statutes are at issue in this case. Two statutes require state licenses for first and secondary mortgage lenders. *See* Conn. Gen. Stat. §§ 36a-486(a), 36a-511(a). Two statutes require mortgage lenders to maintain certain records and to make them available for inspection by the Commissioner. *See id.* §§ 36a-493, 36a-516. And two involve the Commissioner's power to enforce the law through proceedings and the issuance of cease and desist orders. *See id.* §§ 36a-50, 36a-52. A national bank is exempted from the licensing requirements but a subsidiary of national bank expressly is not exempted. *See, e.g., id.* §§ 36a-486, 36a-487(1).

Wachovia Bank is a national banking association organized under the NBA. Wachovia Mortgage is a North Carolina corporation that was initially engaged in making first mortgage loans and has been licensed in Connecticut to do so since 1987. On January 1, 2003, Wachovia Mortgage became a wholly owned subsidiary of Wachovia Bank and surrendered its mortgage licenses with the Commissioner. On February 24, 2003, the Commissioner issued a Notice of Intent to Issue a Cease and Desist Order against Wachovia Mortgage for engaging in the first mortgage lending business in Connecticut without a license. Pursuant to a stipulation with the Commissioner, dated March 31, 2003, Wachovia Mortgage agreed to apply for re-licensing while reserving its right to seek legal action. Wachovia Mortgage also applied for a license to

engage in secondary mortgage lending.

On April 25, 2003, Wachovia Mortgage and Wachovia Bank filed suit in the United States District Court for the District of Connecticut, requesting declaratory and injunctive relief on the ground that the NBA and OCC regulations preempt the state laws' application in this case. The plaintiffs also brought claims under 42 U.S.C. § 1983 for abridgement of rights allegedly provided by federal law.

Upon cross-motions for summary judgment, the District Court found that the Connecticut banking statutes conflict with, and are preempted by, the NBA and OCC regulations – 12 C.F.R. § 7.4006 in particular. Applying the *Chevron* doctrine, the District Court found first that Congress has not spoken on the precise issue of "whether state law should apply to a subsidiary of a national bank in the same way as it applies to the national bank itself." The court further found that section 7.4006 was a reasonable regulation designed to prevent state laws from inhibiting a national bank's ability to conduct banking through a subsidiary, as authorized under 12 U.S.C. § 24 (Seventh).

With respect to the § 1983 claims, the District Court found that the NBA, through 12 U.S.C. § 24 (Seventh) and § 484, provides national banks with the "right" to be free from state regulation. The District Court thus granted summary judgment in favor of Wachovia Bank on its § 1983 claim. The court, however, found that Congress did not provide "rights" to operating subsidiaries, and it granted summary judgment to the Commissioner on Wachovia Mortgage's § 1983 claim. The District Court entered a declaratory judgment in favor of the plaintiffs on the preemption issue and in favor of Wachovia Bank on its

§ 1983 claim, and it closed the case.[1] The Commissioner timely appealed and now challenges the preemption and § 1983 rulings.[2] Wachovia Mortgage does not challenge the dismissal of its § 1983 claim.

DISCUSSION

We review *de novo* a district court's decision to grant summary judgment. *See Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005). In this case, the parties agree that the appeal solely involves legal issues and that there are no disputed facts. The legal issues are: (1) whether the NBA and OCC regulations preempt the Connecticut laws' application to Wachovia Mortgage, and (2) whether the NBA provides Wachovia Bank with rights enforceable under 42 U.S.C. § 1983.

No court of appeals has addressed whether the OCC regulations preempt state regulation of operating

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[1] The District Court did not grant Wachovia Bank any relief on its § 1983 claim apart from the declaratory relief that flowed from the preemption claim. Wachovia Bank did not obtain attorneys' fees pursuant to 42 U.S.C. § 1988.

[2] We have received three *amicus curiae* briefs. In support of the appellant, the Attorneys General of Forty States and the Conference of State Bank Supervisors ("Attorneys General Amici") reiterate the Commissioner's arguments and emphasize states' interests in regulating subsidiaries to protect consumers from unscrupulous lending practices. In support of the appellees, the OCC filed a brief that parallels Wachovia's argument. Also supporting Wachovia, the American Bankers Association and other national trade associations ("ABA Amici") filed a brief focusing on the reasonableness of the OCC's policy judgment in effecting preemption.

subsidiaries. Three district courts have reached this precise issue and have found preemption based on essentially the same reasoning used by the District Court in this case. *See Nat'l City Bank of Ind. v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) ("*Turnbaugh*"); *Wachovia Bank v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich 2004) ("*Watters*"), *appeal docketed*, No. 04-2257 (6th Cir. Oct. 14, 2004); *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003) ("*Boutris*"), *appeal argued*, No. 03-16197 (9th Cir. Nov. 4, 2004).[3] *Watters* and *Boutris* also decided the § 1983 issue, and, contrary to the District Court in this appeal, they found that the NBA does not create federal rights for national banks. *See Watters*, 334 F. Supp. 2d at 965; *Boutris*, 265 F. Supp. 2d at 1176-78. We first lay out the statutory and regulatory framework before addressing the preemption and § 1983 issues in turn.

I. <u>The Federal Statutory and Regulatory Framework</u>

In 1864, Congress enacted the NBA[4] "to facilitate . . . a national banking system." 17 *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (internal quotation omitted). In pertinent part, the NBA establishes nationally chartered banks and grants

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[3] The same district judge who decided *Boutris* issued essentially the same ruling in a later case involving the preemption of California law regarding operating subsidiaries. *See Nat'l City Bank of Ind. v. Boutris*, No. Civ. S-03-0655, 2003 WL 21536818 (E.D. Cal. July 2, 2003), *appeal argued*, No. 03-16461 (9th Cir. Nov. 4, 2004).

[4] Act of June 3, 1864, ch. 106, 13 Stat. 99. The Act of June 3, 1864 was re-titled the National Bank Act by the Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123, 123 (codified at 12 U.S.C. § 38)

these banks certain powers, including "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). To prevent inconsistent or intrusive state regulation from impairing the national system, the NBA provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." 12 U.S.C. § 484(a). These tenets are longstanding, as § 24 (Seventh) is derived from the NBA's initial enactment in 1864 and the restriction on state visitorial power traces back to 1913. *See* Act of June 3, 1864, ch. 106, § 8, 13 Stat. at 101; Federal Reserve Act, ch. 6, § 21, 38 Stat. 251, 272 (1913).

The OCC is the federal agency entrusted with the "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). It has the power to promulgate rules and regulations and may use its rulemaking authority to define the "incidental powers" of national banks beyond those specifically enumerated in the statute. *See id.*; *see also* 12 U.S.C. § 93a (authorizing OCC "to prescribe rules and regulations to carry out the responsibilities of the office"). An OCC regulation declares that, subject to certain exceptions, the OCC has exclusive visitorial powers over national banks, including the power to examine national banks, inspect their records, and regulate their activities authorized by federal banking law. 12 C.F.R. § 7.4000.

Pertinent to this case, the OCC promulgated 12 C.F.R. § 5.34, which provides that a "national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking." 12 C.F.R. § 5.34(e)(1). Section 5.34 establishes federal licensing requirements and examination procedures for

operating subsidiaries and provides that an "operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." *Id.* § 5.34(e)(3). This rule reflects the OCC's determination that a national bank's use of an operating subsidiary is an appropriate incidental power authorized under 12 U.S.C. § 24 (Seventh). *See* Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,348-55 (Nov. 27, 1996) (announcing comprehensive revisions to section 5.34); *see also* Financial and Operating Subsidiaries, 65 Fed. Reg. 12,905 (Mar. 10, 2000) (codifying section 5.34 substantially in its current form).

In 2001, shortly after making pertinent revisions to 12 C.F.R. § 5.34, the OCC promulgated 12 C.F.R. § 7.4006, which declares: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." *See generally* Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,791 (July 2, 2001) (announcing final rule). The OCC stated that the new rule "clarified" the applicability of state law to operating subsidiaries and explained the basis for the rule as follows:

> The majority of commenters who addressed this issue supported the proposal. Many of these commenters said that it is a permissible exercise of the authority granted by the National Bank Act for national banks to create operating subsidiaries that exercise both direct and incidental powers under 12 U.S.C. Section 24(Seventh). These commenters noted that operating subsidiaries have long been authorized for national banks and provide national

> banks with a convenient alternative to conduct activities that the bank could conduct directly. Further, they agreed that operating subsidiaries are, in essence, incorporated departments or divisions of the bank and, accordingly, should not be treated differently than their parent banks under State laws.

Id. at 34,788 (reiterating commenters' view as the basis for the rule); *see also* Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 8178, 8181 (Jan. 30, 2001) (providing same reasoning in Notice of Proposed Rulemaking). The OCC noted that section 7.4006 does not itself preempt any particular state law. *See* 66 Fed. Reg. at 34,790. But the implication is that state laws effecting visitorial power over national bank operating subsidiaries – through licensing requirements, for example – would be preempted, just as they are preempted as applied to national banks. *See id.* at 34,788.

A similar interplay of statutes and regulations exists specifically with respect to national banks' real estate lending powers. Pursuant to 12 U.S.C. § 371, national banks may "arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Under the authority of § 371(a), the OCC promulgated part 34 of title 12 of the Code of Federal Regulations "to set forth standards for real estate-related lending and associated activities by national banks." 12 C.F.R. § 34.1(a). Part 34 "applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34." *Id.* § 34.1(b). Section 34.3 contains the general rule authorizing national banks' real estate lending activities while section 34.4 addresses preemption:

> Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and [12 C.F.R.] § 34.3 without regard to state law limitations.

Id. § 34.4(a). Licensing requirements are specifically listed as a prohibited state limitation. *Id.* § 34.4(a)(1). As the OCC indicated when promulgating 12 C.F.R. § 7.4006, the combined effect of 12 C.F.R. § 34.1(b) and § 34.4 is that state regulation of real estate lending by national bank operating subsidiaries may be preempted. *See* 66 Fed. Reg. at 34,788 n.14.[5]

II. Preemption

The preemption doctrine is rooted in the Supremacy Clause of the Constitution. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152 (1982); *see also* U.S. Const. art. VI, cl. 2. Preemption can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves

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[5] That footnote states: "Several commenters also requested that the final rule [12 C.F.R. § 7.4006] include, as an example, the express statement that 12 CFR 34 (Real Estate Lending and Appraisals) applies to operating subsidiaries. Inclusion of this statement in new § 7.4006 is unnecessary, however, because current § 34.1(b) already provides that part 34 applies to national banks and their operating subsidiaries." 66 Fed. Reg. at 34,788 n.14

no room for state law, or where federal law conflicts with state law. *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996); *De la Cuesta*, 458 U.S. at 153; *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003). This case indisputably involves "conflict preemption," which can arise where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De la Cuesta*, 458 U.S. at 153 (internal quotations and citations omitted).

"Federal regulations have no less pre-emptive effect than federal statutes." *Id.* Federal courts have recognized that the OCC may issue regulations with preemptive effect. *See, e.g., Wells Fargo Bank of Tex.*, 321 F.3d at 493-94; *Conf. of State Bank Supervisors v. Conover*, 710 F.2d 878, 882, 885 (D.C. Cir. 1983). Congress has expressly recognized the OCC's power to preempt particular state laws by issuing opinion letters and interpretive rulings, subject to certain notice-and-comment procedures. *See* 12 U.S.C. § 43.

Preemption is always a matter of congressional intent. *De la Cuesta*, 458 U.S. at 152. But the Supreme Court has made it clear that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law" and that a "narrow focus" on Congress's intent to supercede state law is "misdirected." *Id.* at 154. The proper focus is on whether the agency effecting preemption "has exceeded [its] statutory authority or acted arbitrarily." *Id.*; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (calling "express statement of pre-emptive intent" unnecessary for conflict preemption); *Wells Fargo Bank of Tex.*, 321 F.3d at 493 ("[W]e are concerned with whether Congress intended to delegate to the OCC the authority to [promulgate its

regulation], not with whether Congress intended that state law would be preempted.").

There is typically a presumption against preemption in areas of regulation that are traditionally allocated to states and are of particular local concern. *See Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005), *petition for cert. filed*, No. 04-1553 (May 16, 2005). "The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Id.* (citations omitted); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) (explaining operation of presumption generally); *Barnett Bank*, 517 U.S. at 32-33 (documenting the long history of federal regulations preempting state laws that purport to govern federally chartered banks); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (tracing federal preemption as to national banks back to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819)). States have a legitimate role in regulating certain banking activity, and it is often said that we have a "dual banking system" of federal and state regulation. *See generally Nat'l State Bank v. Long*, 630 F.2d 981, 985-86 (3d Cir. 1980); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 136-37 (D. Conn. 1999). Nonetheless, state regulation is preempted if it will "significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33; *see also id.* at 32 (explaining that history of national banking legislation "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law").

Given these principles, the Commissioner

incorrectly attempts to frame the issue as whether Congress has expressly and clearly manifested an intent to preempt state visitorial power over operating subsidiaries. The focus, rather, is on the reasonableness of the OCC's exercise of its regulatory authority. *See De la Cuesta*, 458 U.S. at 153-54. The District Court properly approached the issue through the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See NationsBank*, 513 U.S. at 257-58 (applying the *Chevron* doctrine to determine whether OCC was authorized to grant a national bank's application to sell annuities); *Wells Fargo Bank of Tex.*, 321 F.3d at 492-95 (applying *Chevron* and deferring to agency rule preempting state law concerning check-cashing fees).[6] Pursuant to

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[6] Other courts addressing NBA preemption issues have not applied *Chevron* but have adopted a similar approach requiring deference to a reasonable regulation issued within the OCC's authority. *See Bank of Am.*, 309 F.3d at 562-63; *Turnbaugh*, 367 F. Supp. 2d at 814-19 (identifying *De la Cuesta* as establishing a distinct framework for preemptive regulations but also applying *Chevron* and reaching the same result under both analyses); *Boutris*, 265 F. Supp. 2d at 1170 (concluding, without reference to *Chevron*, that 12 C.F.R. § 7.4006 has preemptive force because it "reflects a reasonable construction of the [NBA]"); *but cf. Watters*, 334 F. Supp. 2d at 963-65 (applying *Chevron* analysis and deferring to OCC regulations at issue in this case). Neither party has questioned that the *Chevron* framework generally applies in this case. In any event, the analysis would be the same even if we did not apply *Chevron* itself. Under *De la Cuesta*, which addressed preemptive regulations in a decision prior to *Chevron*, we would review the OCC regulations "only to determine whether [the agency] has exceeded [its] statutory authority or acted arbitrarily," and we would enforce the regulations unless they are

Chevron, we ask, first, "whether the intent of Congress is clear as to the precise question at issue." *NationsBank*, 513 U.S. at 257 (internal quotation omitted). If Congress's intent is clear, "that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (internal quotation and citation omitted). If there is an ambiguity, we must "give great weight to any reasonable construction" of the statutes by the OCC. *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987); *see also NationsBank*, 513 U.S. at 257; *De la Cuesta*, 458 U.S. at 153-54.

A. Whether Congress Has Addressed the Issue; Whether the Regulations Are Within the OCC's Authority Under the Statutory Scheme

The District Court properly identified the precise question as whether Congress has addressed the manner in which state law should apply to a national bank operating subsidiary. As the District Court recognized, 12 U.S.C. § 484 is the anchor for preemption in providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." Section 484 does not address a national bank's operating subsidiary, and the Commissioner argues that, based on this omission, Congress intended not to preempt state laws concerning operating subsidiaries. The Commissioner also argues that operating subsidiaries are national bank "affiliates," as

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unreasonable or inconsistent with the statutory scheme. *De la Cuesta*, 458 U.S. at 154.

provided in 12 U.S.C. § 221a, and that other statutes governing affiliates evince an intent not to provide the OCC or federal government with exclusive visitorial power. The District Court properly rejected these arguments.

First, the Commissioner's argument concerning § 484 fails to account for how preemption actually arises in this case. The OCC does not purport to define the term "national bank," as used in § 484, to include an "operating subsidiary." Instead, the OCC has interpreted a national bank's "incidental powers" under 12 U.S.C. § 24 (Seventh) to include the power to conduct the business of banking through an operating subsidiary. *See* 12 C.F.R. § 5.34. The OCC then promulgated 12 C.F.R. § 7.4006 to codify its belief that states should not be able to obstruct this power by imposing regulations on the subsidiary that could not be imposed on the parent bank. It is undisputed that, as a general matter, the "'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). Moreover, neither the Commissioner nor the Attorneys General Amici dispute that the OCC is empowered to authorize national banks to use operating subsidiaries in conducting their business of banking. To the extent that using an operating subsidiary is a legitimate power granted to national banks, 12 U.S.C. § 484 provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers. *See Barnett Bank*, 517 U.S. at 33 (explaining that state laws are preempted if they "significantly interfere with the national bank's exercise of its powers").

The Commissioner's second argument concerning "affiliates" is more nuanced but fares no better. As the Commissioner explains, the Banking Act of 1933 (the "Glass-Steagall Act") enacted 12 U.S.C. § 221a(b), codifying the term "affiliate" to "include any corporation, business, trust, association, or similar organization" that is directly or indirectly controlled by a "member bank." *See* Banking Act of 1933, ch. 89, § 2(b), 48 Stat. 162, 162.[7] The Glass-Steagall Act also enacted 12 U.S.C. §§ 161(c) and 481, giving the OCC what the Commissioner characterizes as "non-exclusive regulatory authority" over national bank affiliates. The Commissioner argues that a subsidiary like Wachovia Mortgage falls within the definition of an "affiliate" in 12 U.S.C. § 221a(b), that Congress declined to give the OCC exclusive visitorial authority over affiliates, and that Congress thus evinced an intent not to preempt state laws over operating subsidiaries.

As the District Court observed, however, the definition of "affiliates" plainly covers a category of entities much broader than operating subsidiaries, and operating subsidiaries do not fit neatly into these provisions of the Glass-Steagall Act. The Glass-Steagall Act arose out of Congress's belief "that commercial bank involvement in underwriting and securities speculation had unduly placed bank assets at risk and had contributed to the widespread bank closings that occurred during the Great Depression." *Sec. Indus. Ass'n v. Bd. of Gov'rs of the Fed. Reserve Sys.*, 716 F.2d 92, 97 (2d Cir. 1983) (internal quotations

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[7] There is no contention that Wachovia Bank is not a "member bank," which includes any "national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks." 12 U.S.C. § 221.

omitted), *aff'd*, 468 U.S. 207 (1984). The 1933 Act was aimed principally at that concern and "the inherent conflict between the promotional role of an investment banker and the commercial banker's obligation to give disinterested investment advice." *Id.* at 98. For example, the Act introduced a key amendment to 12 U.S.C. § 24 (Seventh) to limit national banks' purchasing and selling of securities and to preclude their underwriting the issuance of securities. *See* Glass-Steagall Act § 16, 48 Stat. at 184-85. Thus, as the District Court found, the Glass-Steagall Act targeted national banks' use of affiliates to engage in non-commercial banking and does not address national banks' use of operating subsidiaries to engage in the business of banking.

Moreover, it was not until the 1960s that the OCC first recognized national banks' use of a "subsidiary operations corporation" to conduct "functions or activities . . . that a national bank is authorized to carry on." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,459 (Aug. 31, 1966). That regulation reflected the OCC's interpretation of national banks' powers under 12 U.S.C. § 24 (Seventh) in light of the "ever changing and growing" business of banking that had "developed rapidly during recent years" and that called for more flexibility in national banks' ability to structure their banking activities. 31 Fed. Reg. at 11,460.

With the passage in 1999 of the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338, Congress, at least implicitly, recognized the unique role of operating subsidiaries. In enacting 12 U.S.C. § 24a, the GLBA authorized national banks to control "financial subsidiaries" pursuant to certain conditions and requirements, but it excluded from the definition of

"financial subsidiary" a subsidiary "that engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). The GLBA's legislative history expressly recognizes the use of operating subsidiaries as provided by the OCC:

> For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations.

S. Rep. No. 106-44, at 8 (1999).[8] Similarly, 12 U.S.C. §§

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[8] In 1996, prior to the GLBA, the OCC promulgated 12 C.F.R. §§ 5.34 and 34.1(b) to allow national banks to conduct business through operating subsidiaries pursuant to the same authorization, terms, and conditions that apply to the parent national bank. The OCC understood the GLBA as affirming its regulation of operating subsidiaries and promptly revised 12 C.F.R. § 5.34 "to make conforming changes and streamline procedures for banks that engage in activities through operating subsidiaries." *See* Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,905 (Mar. 10, 2000). In 2001, the OCC promulgated 12 C.F.R. § 7.4006 and cited the GLBA's recognition of operating subsidiaries as a basis for that rule.

371c and 371c-1 provide distinct treatment to operating subsidiaries by restricting bank transactions with affiliates but excluding subsidiaries from the definition of "affiliate" for those provisions.

Even if operating subsidiaries can fall under the definition of "affiliate" for some purposes, there is still no manifest congressional intent to preclude the OCC regulations in this case. The Commissioner relies on 12 U.S.C. §§ 161(c) and 481, arguing that they grant the OCC non-exclusive regulatory power over affiliates and that, by implication, do not allow the OCC to preempt state visitorial power over any affiliate. But §§ 161(c) and 481 simply provide, respectively, that national bank affiliates shall report to the OCC and that the OCC shall examine affiliates to disclose the relations between the national bank and the affiliate.[9] These provisions do not speak broadly to the allocation of visitorial power between the federal and state governments. They primarily reflect Congress's concern with national banks' engaging in non-commercial bank business and do not address or contemplate national banks' later-emerging power to engaging in the business of banking through operating subsidiaries. These provisions thus do not address whether state laws regarding operating subsidiaries may be preempted as interfering with national banks' incidental powers under 12 U.S.C. § 24 (Seventh) and 12 C.F.R. § 5.34.

Overall, the history of the banking laws indicates that operating subsidiaries have been treated distinctly by Congress and the OCC, and no statute speaks directly to the

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See Investment Securities, Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001).

[9] Both provisions were part of the Glass-Steagall Act §§ 27-28, 48 Stat. at 191-93.

scope of federal versus state power over them. Particularly with the passage of the GLBA, it appears that Congress has intentionally left open a gap concerning the treatment of national bank operating subsidiaries. The OCC has the authority to fill that gap by defining a national bank's incidental powers to include conducting the business of banking – business that the national bank itself could conduct directly – through an operating subsidiary. *See* 12 C.F.R. §§ 5.34. Having so defined a national bank's power to conduct business through an operating subsidiary, the OCC further has the authority to preempt states law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank. *See* 12 C.F.R. §§ 7.4006, 34.1, 34.4.

B. The Reasonableness of the OCC's Regulations

Having concluded that Congress has not addressed the precise issue in this case and that the OCC generally has the authority to promulgate the regulations at issue, we must defer to the regulations if they reflect a reasonable construction of the statutory scheme. *See NationsBank*, 513 U.S. at 257; *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982). The Commissioner attacks the reasonableness of the rationale for 12 C.F.R. § 7.4006 provided in the Federal Register. He also argues that we should not defer to section 7.4006 because it merely reflects the OCC's view of what a court would hold. Neither argument has merit as the OCC regulations reflect reasonable policy determinations.

1. The Rationale Underlying 12 C.F.R. § 7.4006

The Commissioner focuses on and attacks a particular rationale expressed for 12 C.F.R. § 7.4006: that "operating subsidiaries are, in essence, incorporated

departments or divisions of the bank and, accordingly, should not be treated differently than their parent banks." 66 Fed. Reg. at 34,788. The Commissioner argues that this rationale unreasonably disregards the corporate separateness of a parent bank and improperly allows national banks to take advantage of the legal benefits of conducting business through a subsidiary while remaining free from state regulation as if the subsidiary were itself part of the parent national bank.

We disagree. There is nothing unreasonable about the OCC's rationale. The OCC is not disregarding any principle of corporate separateness; it is recognizing that "[f]or decades national banks have been authorized to use the operating subsidiary as a convenient and useful corporate form for conducting activities that the parent bank could conduct directly." 66 Fed. Reg. at 34,788. Section 7.4006 reflects the OCC's policy judgment that national banks' use of operating subsidiaries as separately structured corporate entities is desirable and that it should not be hindered by state regulations.

This rationale is developed more fully in the Federal Register entries concerning 12 C.F.R. § 5.34. For example, the OCC has noted that "the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations." Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996); *see also* Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,908-09 (Mar. 10, 2000). This rationale for permitting national banks to conduct business through operating subsidiaries dates back to 1966, when the OCC explained: "The use of controlled

subsidiary corporations provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operations costs, improving effectiveness of supervision . . . or separating particular operations of the bank from other operations." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,460 (Aug. 31, 1966). Thus, the OCC has long maintained that an operating subsidiary is legally distinct from the parent bank but is connected to the parent bank's ability to conduct business in a safe and sound manner. The OCC's well-explained policy judgment is reasonable and entitled to deference.

2. Whether Section 7.4006 Simply Reflects the OCC's View of Case Law

The Commissioner's next argument arises out of the OCC's discussion of an Executive Order that requires certain notice-and-comment procedures for agency regulations with federalism implications and preemptive effect. *See* Exec. Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999). In addressing whether the Executive Order applied to the promulgation of 12 C.F.R. § 7.4006, the OCC explained that the proposed changes

> do not affect the OCC's intention to address questions of preemption on a case-by-case basis, according to preemption principles derived from the United States Constitution, as interpreted through judicial precedent. Section 7.4006 generally provides that national bank operating subsidiaries are subject to State law to the extent State law applies to their parent bank. The section itself does not effect preemption of State law; it reflects the conclusion we believe a federal court would reach,

> even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent.

66 Fed. Reg. at 34,790. The Commissioner seizes on the last sentence in arguing that 12 C.F.R. § 7.4006 merely reflects the OCC's view of what courts would hold, and he contends that courts are not required to defer to an agency's interpretation of case law. To this extent, the Commissioner cites *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002), and *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). Both cases involve adjudicative decisions by the NLRB and stand for the proposition that such decisions are not necessarily entitled to deference to the extent that they rely solely on the interpretation of federal judicial decisions; courts, rather than agencies, have expertise in interpreting case law.

In this case, however, the OCC's codification of section 7.4006, at its core, reflects a policy judgment about national banks' use of operating subsidiaries. Section 7.4006 "clarified" that state laws apply to operating subsidiaries to the same extent that they apply to the parent national bank, and the clarification reflects the OCC's view that preemption already existed based on the combination of federal statutes (12 U.S.C. §§ 24 (Seventh), 371, and 484) and preexisting regulations (12 C.F.R. §§ 5.34, 34.1(b), and 34.4). *See* 66 Fed. Reg. at 34,788 & n.14. The body of the discussion on section 7.4006 plainly indicates the OCC's position that national banks should be able to "use the operating subsidiary as a convenient and useful corporate form for conducting activities" without substantial restrictions imposed by states. *See id.* at 34,788. The discussion is also replete with language indicating a policy determination based on "safety and soundness"

considerations rather than any pure interpretation of law. *See id.* at 34,789.

Even if the policy determination were not manifest in section 7.4006, it is extensively developed in the OCC's recent revision of 12 C.F.R. part 34, which was designed to demarcate more clearly what state laws are and are not preempted with respect to real estate lending activities. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004).[10] There the OCC explained that 12 U.S.C. § 24 (Seventh) provides a "flexible grant of authority" to national banks to further "Congress's long-range goals in establishing the national banking system." *Id.* at 1907. The OCC noted that achievement of these goals requires national banks "whose powers are dynamic and capable of evolving" because "the financial services marketplace has undergone profound changes" in recent years. *Id.* The OCC specifically observed that "[c]hanges in applicable law also have contributed to the expansion of markets for national banks and their operating subsidiaries." *See id.* The OCC found, however, that "national banks' ability to conduct operations to the full extent authorized by Federal law has been curtailed as a result" of increasing state efforts to regulate bank activities. *Id.* at 1908. As an example, the OCC pointed to its recent ruling that the Georgia Fair Lending Act ("GFLA") was preempted from applying to national banks and their operating subsidiaries. *See id.* (citing Preemption Determination and Order, 68 Fed. Reg. 46264-02 (Aug. 5, 2003)). The OCC stated that "the GFLA

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[10] Since 1996, 12 C.F.R. § 34.1(b) has stated that part 34 "applies to national banks and their operating subsidiaries as provided in 12 CFR § 5.34," and 12 C.F.R. § 34.4 has discussed the applicability of state law to national banks' real-estate lending powers.

caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia. National banks have also been forced to withdraw from some products and markets in other states as a result of the impact of state and local restrictions on their activities." *Id.*

Overall, the OCC concluded:

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions. The OCC therefore is issuing this final rule in furtherance of its responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system, and in furtherance of their safe and sound operations.

Id. (footnote omitted). This reasoning is consistent with, and is fairly imputed to, the OCC's statements concerning the other regulations in this case. Even if this reasoning could not be imputed to 12 C.F.R. § 7.4006, 12 C.F.R. §§ 34.1(b) and 34.4 independently support a finding of preemption in this case.

3. Conclusion on the Reasonableness of the OCC Regulations

For the reasons explained above, the OCC regulations reflect a consistent and well reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending. While the Commissioner and Attorneys General Amici raise legitimate concerns about states' interest in protecting consumers and about the OCC's ability to regulate operating subsidiaries effectively, the OCC has responded to these concerns in its rulemaking. *See, e.g.*, 61 Fed. Reg. at 60,354-55 (justifying 1996 revisions to 12 C.F.R. § 5.34). The states' proper recourse at this point is to Congress. We must defer to the OCC's authorized and reasonable implementation of the NBA.

III. Wachovia Bank's Claims Under 42 U.S.C. § 1983

The next issue is whether the NBA provides Wachovia Bank with federal rights enforceable under 42 U.S.C. § 1983. A violation of the Supremacy Clause is distinct from, and does not necessarily give rise to, a violation of federal rights actionable under § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989); *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987) ("A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law. The primary function of the Supremacy Clause is to define the relationship between state and federal law." (internal quotations omitted)). At the same

time, the fact that a federal statute preempts state law "does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy." *Golden State*, 493 U.S. at 108.

In *Blessing v. Freestone*, the Supreme Court explained that we "have traditionally looked at three factors" to determine whether a statute gives rise to a federal right:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340-41 (1997) (internal quotations and citations omitted). The Supreme Court has clarified, however, that "it is only violations of *rights*, not *laws*, which give rise to § 1983 actions," and the Court has rejected an interpretation of *Blessing* that "our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Thus, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit" under § 1983. *Id.* at 286.

Moreover, the concurrence in *Gonzaga University* noted that the "statute books are too many, the laws too diverse, and their purposes too complex, for any single

formula to offer more than general guidance." *Id.* at 291 (Breyer, *J.*, concurring) (referring to *Blessing*). We understand the *Gonzaga University* majority and concurring opinions to mean, at least, that courts should not find a federal right based on a rigid or superficial application of the *Blessing* factors where other considerations show that Congress did not intend to create federal rights actionable under § 1983.

In this case, the District Court applied the *Blessing* factors and found that the NBA intended to create federal rights for national banks. As to the first factor, the District Court found that 12 U.S.C. § 484(a) – which makes national banks free from state visitorial authority – was written with "an unmistakable focus on the benefitted class" similar to the provisions of antidiscrimination statutes. The District Court further found that the right is sufficiently concrete for judicial enforcement and that the provision is phrased in mandatory, rather than precatory language. For the reasons explained below, however, the District Court's analysis fails to account for the unique role of national banks in the statutory scheme of the NBA. When viewed as a whole and in light of its history, it is plain that the NBA addresses the allocation of federal versus state regulatory power and does not provide national banks with rights enforceable under § 1983.

While the provisions at issue – 12 U.S.C. §§ 24 (Seventh), 371, and 484 – may focus on national banks, the structure and history of the provisions indicate that Congress did not intend to provide national banks with individual rights as private entities. As the Supreme Court explained in 1927: "National banks are not merely private moneyed institutions, but agencies of the United States created under its laws to promote its fiscal policies." *First Bank of Hartford, Wisc. v. City of Hartford*, 273 U.S. 548,

550 (1927) (internal quotation omitted) (addressing states laws taxing national banks). It has long been held that "[n]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), *quoted by Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978); *see also Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions . . . ."); *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875) ("[N]ational banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."). Similarly, in *Easton v. Iowa*, the Court explained that the legislation creating and regulating national banks

> has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which . . . might impose limitations . . . . Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain.

188 U.S. 220, 229 (1909); *see also id.* at 230 (rejecting notion that "national banks are organized and their business prosecuted for private gain"). These cases, which indicate Congress's purpose in enacting the NBA, show that any focus on national banks – as relevant to the first *Blessing* factor – does not imply the creation of a federal right. On the contrary, Congress created national banks as

instruments to foster a national banking system. As the Supreme Court has stated: "[W]hen congressional preemption benefits particular parties only as an incident of the federal scheme of regulation, a private damages remedy under § 1983 may not be available." *Golden State*, 493 U.S. at 109.

Moreover, while *Blessing* dealt with Congress's exercise of its spending power, *see Blessing*, 520 U.S. at 333-34, the Supreme Court's decision in *Golden State* provides a slightly different approach to determining whether preemptive legislation creates federal rights, and *Golden State* undermines Wachovia Bank's argument under the NBA. In *Golden State*, which found that the National Labor Relations Act ("NLRA") both effected preemption and created federal rights, the Court distinguished between two kinds of preemption rules. *See Golden State*, 493 U.S. at 110. The first is based on *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and involves a rule of preemption that "is more akin to a rule that denies either [the federal or state] sovereign the authority to abridge a personal liberty." *Golden State*, 493 U.S. at 112. The second is the rule of *San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959), that state jurisdiction over conduct protected by the NLRA is preempted "in the interest of maintaining uniformity in the administration of the federal regulatory jurisdiction." *Golden State*, 493 U.S. at 110; *see id.* (noting that the *Machinists* Rule and *Garmon* rule are "fundamentally distinct"). In *Golden State*, the Court allowed a claim under § 1983 after finding that Congress intended to give parties the ability to engage in peaceful methods of economic pressure free from government interference, whether by the federal or state government. *See id.* at 111-12.

In contrast, the issue in this case plainly involves a *Garmon*-related rule of preemption directed at "whether state or federal regulations should apply to certain conduct." *Id.* at 112. There is no suggestion that the NBA creates a "free zone from which all regulation, whether federal or State, is excluded." *Id.* at 111 (internal quotations and citation omitted). To the contrary, the OCC extended preemption of state laws concerning operating subsidiaries only after promulgating extensive federal regulatory requirements over those subsidiaries. *See generally* 12 C.F.R. § 5.34. Indeed, national banks' freedom from state regulation exists and expands as federal regulation of national banks becomes more defined. This dynamic indicates a preemptive scheme involved in "maintaining uniformity in the administration of the federal regulatory jurisdiction," as opposed to a scheme that also creates federal rights. *See Golden State*, 493 U.S. at 110.

In addition, despite the fact that the NBA's pertinent provisions are long-standing – 12 U.S.C. § 24 (Seventh) traces back to 1864 and § 484 traces back to 1913 – there is no indication of any other court finding that the NBA creates federal rights for banks. The only court of appeals to address the issue found that the NBA does not allow for actions under § 1983. *See First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minneapolis*, 636 F.2d 195 (8th Cir. 1980) (addressing 12 U.S.C. §§ 85 and 86, which deal with the rate of interest a national bank may charge on loans). We agree with the reasoning of the Court of Appeals for the Eighth Circuit that the powers granted to national banks do not involve "important personal rights akin to fundamental rights protected by the Fourteenth Amendment" where courts have typically allowed a claim under § 1983. *Id.* at 198. Thus, the presence of a superficial parallel between the language of 12 U.S.C. § 484 and the language in certain anti-discrimination provisions does not

compel an inference that Congress intended to provide national banks with federal rights.

Finding that Wachovia Bank has rights enforceable under § 1983 would likely allow national banks to pursue § 1983 claims whenever preemption exists by virtue of the NBA and OCC regulations. Such a finding is inappropriate in light of the complex regulatory framework and the ever-changing nature of the industry and the powers exercised by national banks. *See, e.g.*, Investment Securities, Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,790 (July 2, 2001) (addressing 12 C.F.R. § 7.4006 and expressing the OCC's intention to address preemption on a case-by-case basis). Allowing § 1983 claims in this context could also mean that § 1983 claims – and the potential for damages and attorneys' fees – may arise out of any number of regulatory statutes with preemptive effect and could have widespread repercussions for the balance of federal and state regulatory authority in general. Given the status of national banks as federal instrumentalities and the federal government's pervasive regulation of such banks, it is plain that the NBA involves a preemption scheme – a scheme to allocate power between the federal and state governments – and that there is no clear intent to provide national banks with federal rights enforceable under § 1983.

CONCLUSION

The District Court's entry of a declaratory judgment in favor of the plaintiffs on the basis of preemption is AFFIRMED. With respect to Wachovia Bank's claim under 42 U.S.C. § 1983, the District Court's grant of summary judgment in favor of Wachovia Bank is REVERSED, the denial of the Commissioner's motion for summary judgment is VACATED, and the case is

REMANDED to the District Court with instructions to enter partial summary judgment in favor of the Commissioner.

Each party shall bear its own costs.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION, Plaintiffs,	:	CIVIL No. 3:03-cv-0738(JCH)
v.	:	
JOHN P. BURKE, BANKING COMMISSIONER, Defendant.	:	JUNE 1, 2004

AMENDED RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT [DKT. NOS. 11, 21]

Wachovia Bank, N.A., and its wholly-owned subsidiary, Wachovia Mortgage Corporation, (collectively "plaintiffs") bring this suit against John P. Burke, Banking Commissioner of the State of Connecticut ("the Commissioner"), in his official capacity, seeking to enjoin his enforcement of certain Connecticut statutes that require businesses engaged in the making of first and second mortgage loans to obtain and maintain a Connecticut state license. The plaintiffs argue that the National Bank Act ("Act"), 12 U.S.C. § 21 et seq., and regulations promulgated by the Office of the Comptroller of the Currency ("OCC") preempt this licencing scheme as applied to Wachovia Mortgage. They seek a declaratory judgment and relief pursuant to

42 U.S.C. § 1983.[1] Both the plaintiffs and the Commissioner have moved for summary judgment.

I. BACKGROUND

Congress enacted the National Bank Act in 1864. The Act was designed to "facilitate . . . a national banking system." Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 314-15 (1978) (internal quotation omitted). It was further intended to "protect national banks against intrusive regulation by the States." Bank of Am. v. City and County of San Francisco, 309 F.3d 551, 561 (9th Cir. 2002).

In furtherance of these goals, the Act created a system by which so-called "national" banks would receive a federal charter and would be free from state "visitorial" power except as permitted by law or court order. See 12 U.S.C. § 484. These national banks are regulated by a federal agency, the OCC, which is charged with the supervision and regulation of national banks and the administration of the Act. 12 U.S.C. § 1 et seq. The Supreme Court has noted that this establishment of "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges" is "an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10 (2003) (quoting

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[1] Briefs amici curiae have been filed by: the OCC; the American Bankers Association, Consumer Mortgage Coalition, Consumer Bankers Association, and Electronic Financial Services Council ("American Bankers Association"); The New York Clearing House Association, L.L.C. ("The Clearing House"); and Forty-Three States and State Banking Officials ("State Banking Officials").

Tiffany v. Nat'l Bank of Missouri, 18 Wall 409, 412 (1874)).

Wachovia Bank is a national banking association organized under the National Bank Act. Wachovia Mortgage is a North Carolina corporation, initially engaged in the business of making first mortgage loans in, among other places, the state of Connecticut, and has been licensed to do so since March 5, 1987. Wachovia Mortgage became a wholly-owned subsidiary of Wachovia Bank on January 1, 2003. It is currently engaged in the business of making both first and secondary mortgage loans.

Connecticut has delegated authority to enforce banking laws to its Banking Commissioner. Six Connecticut banking statutes are at issue here. Two require licenses for first and secondary mortgage lenders (Conn. Gen. Stat. §§ 36a-486(a) and 36a-511(a)); two require mortgage lenders to maintain certain records and make them available for inspection by the Banking Commissioner (Conn. Gen. Stat. §§ 36a-493 and 36a-516); one permits the Commissioner to conduct enforcement proceedings (Conn. Gen. Stat. § 36a50); and one allows the Commissioner to issue cease and desist orders for violation of Connecticut banking laws (Conn. Gen. Stat. § 36a-52).

After it became a wholly-owned subsidiary of Wachovia Bank on January 1, 2003, Wachovia Mortgage declined to renew its mortgage-lending licence with the Commissioner. On February 24, 2003, the Commissioner issued a Notice of Intent to Issue a Cease and Desist Order ("Notice") against Wachovia Mortgage for engaging in the first mortgage lending business in Connecticut without a lending license since January 1, 2003. Wachovia Mortgage and the Commissioner eventually entered into a Stipulation and Agreement, dated March 31, 2003, whereby the

Commissioner withdrew the Notice and Wachovia Mortgage agreed to apply for relicensing, while reserving its right to seek judicial review or otherwise challenge the Commissioner's determination that it was subject to the licencing requirements. Wachovia Mortgage also applied for a Secondary Mortgage Lender License, because it desired to engage in the business of secondary mortgage lending in Connecticut.

The plaintiffs filed this suit on April 25, 2003, requesting injunctive and declaratory relief, on the grounds that the state's action is preempted by federal law under the Supremacy Clause of the United States Constitution,[2] and that the state's action deprives the plaintiffs of federal rights granted by the Act and OCC regulations, which rights are actionable pursuant to 42 U.S.C. § 1983. The parties have filed cross-motions for summary judgment.

II. DISCUSSION

A. Standard

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine

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[2] "'The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power-conferring provision, one that allocates authority between the national and state governments . . . .'" Western Air Lines, Inc. v. Port Auth. of New York and New Jersey, 817 F.2d 222, 226 (2d Cir. 1987) (quoting White Mountain Apache Tribe v. Williams, 810 F.2d 844, 848 (9th Cir. 1987)). The Supremacy Clause supports an action to enjoin enforcement of a state statute that "runs afoul of a federal legislative scheme." Id.

issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002). The parties agree that there are no issues of material facts in dispute. Thus, the court must determine whether plaintiffs or defendant are entitled to summary judgment as a matter of law.

B. The Statutes and Regulations at Issue

The court begins by surveying the scheme of laws and regulations that forms the basis of the this suit. Section 484(a) of the Act provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." This provision, on its face, evidences a broad intent to preempt state law as to national banks. Case law has established, however, that Congress did not intend to deprive the States of all of their power to regulate national banks. States may regulate "where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." Barnett Bank of Marion County, N.A., v. Nelson, 517 U.S. 25, 33 (1996) (citing cases).

The general powers granted to a national bank are delineated in 12 U.S.C. § 24(Seventh). Section 24(Seventh) gives national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." The Supreme Court has recognized that the powers "incidental" to the business of banking authorized by 12 U.S.C. § 24(Seventh) are not limited to those enumerated in section 24(Seventh). Instead, "the

Comptroller therefore has discretion to authorize activities beyond those specifically enumerated." NationsBank of North Carolina, N.A., v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995).

More specifically, national banks also have the authority to conduct their activities through operating subsidiaries. The OCC first codified this power in 1966. See Wells Fargo Bank, N.A., v. Boutris, 265 F. Supp. 2d 1162, 1168 (E.D. Cal. 2003) (quoting Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459, 11,459-60 (Aug. 31, 1966)). At that time, the OCC explained that the power to operate through a subsidiary "may properly be found among such 'incidental powers' of the bank 'as shall be necessary to carry on the business of banking' within the meaning of 12 U.S.C. § 24(Seventh), or as incidental to another Federal banking statute . . . ." Id.

Today, a national bank's authority to operate through a subsidiary is embodied in 12 C.F.R. § 5.34. That section outlines the guidelines for establishing operating subsidiaries and authorizes national banks to "conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC or otherwise under statutory authority." 12 C.F.R. § 5.34(e)(1). In order to establish an operating subsidiary, a national bank must comply with the OCC's licensing requirements under section 5.34(b). See Wells Fargo, 265 F. Supp. 2d at 1167.

Congress itself has implicitly recognized the ability of a national bank to conduct its authorized activities through an operating subsidiary in the Graham-Leach-Bilcy Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338

(1999), codified, among other places, at 12 U.S.C. § 24a. That section does not mention operating subsidiaries, but expressly contemplates that national banks use "financial subsidiaries" to conduct banking business and further authorizes them to use such subsidiaries to conduct types of business, like securities underwriting, in which national banks themselves could not otherwise engage. See id. at § 24a(g)(3).

Unlike the non-banking business authorized by the GLBA, the mortgage-lending activities at issue here could be conducted directly by Wachovia Bank itself. A national bank's authority to engage in real estate transactions is found in 12 U.S.C. § 371(a), which "authorizes national banks to make real estate and other types of loans, and specifies security requirements for various forms of financing." Huntington Towers, Ltd., v. Franklin Nat'l Bank, 559 F.2d 863, 871 (2d Cir. 1977). Section 371 expressly delegates responsibility to the OCC for defining those powers. 12 U.S.C. § 371(a). The OCC does so in 12 C.F.R. § 34.1, which explicitly applies to "national banks and their operating subsidiaries," and sets forth standards for real estate lending and associated activities by national banks.

Finally, section 7.4006, which is the crux of the current controversy, specifies "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

C. Standing

As a preliminary matter, the Commissioner argues briefly that Wachovia Bank does not have standing to maintain this action. In essence, the standing inquiry

focuses on whether the plaintiff is the proper party to bring suit. See Baur v. Veneman, 352 F.3d 625, 632 (2d Cir. 2003). In order to have constitutional standing to pursue a claim, a plaintiff must demonstrate: (1) an injury in fact; (2) caused by the conduct complained of; (3) and that such injury is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also Lerman, 232 F.3d at 142.

The Commissioner argues that Wachovia Bank has no "injury" of its own. See Franchise Tax Bd. of Calif. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990) (parent must demonstrate some injury to itself, independent of the injury to its subsidiary). However, Wachovia Bank claims that the Commissioner's attempted enforcement against Wachovia Bank of the Connecticut statutes at issue impinges upon one of the Bank's right to be subject to the visitation of the OCC alone, except as otherwise authorized by federal law, and its power to conduct business "incidental to the business of banking" as authorized by 12 U.S.C. 24(Seventh). For this reason, and as discussed more fully below, in relation to the reasonableness of the OCC's promulgation of section 7.4006 and Wachovia Bank's section 1983 claim, the Bank has clearly alleged an "injury" of its own and has standing to pursue its claims. See, e.g., Baur, 352 F.3d at 632 (injury must be "concrete and particularized," as well as "actual or imminent, not conjectural or hypothetical") (quoting Lujan, 504 U.S. at 560).

D. Preemption Claim

Plaintiffs, and the OCC appearing as amicus on their behalf, argue that 12 C.F.R. § 7.4006, which makes state law applicable to a subsidiary in the same manner as to its parent, preempts the Commissioner's enforcement of

Connecticut General Statutes §§ 36a486, 36a-511, 36a-493, 36a-516, and of 36a-50 and 36a-52 when applied to the mortgage business of Wachovia Mortgage.

Preemption can occur in different ways. See Barnett Bank, 517 U.S. at 31. The plaintiffs here rely on "conflict" preemption. See Pls.' Opp. At 2. They argue that, under Section 7.4006, because the Commissioner cannot enforce the statutes at issue against Wachovia Bank, neither can he enforce them against Wachovia Mortgage.

1. Conflict

The primary conflict at issue here is that between the Commissioner's threatened enforcement of the Connecticut statutes as to Wachovia Mortgage, and section 7.4006. The Commissioner concedes that he could not enforce the statutes against Wachovia Bank itself, which, as discussed above, has been authorized by Congress to engage in real estate lending pursuant to 12 U.S.C. § 371 and which is subject exclusively to OCC "visitation" with regard to that banking activity. The Commissioner thus, in effect, concedes that the enforcement at issue is "visitation," but asserts his authority to regulate on the ground that Wachovia Mortgage is a subsidiary of, not itself, a "national bank" as specified in 12 U.S.C. § 484. This enforcement as to Wachovia Mortgage, but not as to Wachovia Bank, seemingly creates a direct conflict with section 7.4006, which requires that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

The Commissioner first argues that section 7.4006 is not a preemptive regulation. In theory, the parties agree that federal regulations "have no less pre-emptive effect

than federal statutes," Fidelity Federal Savings and Loan Assn. v. de la Cuesta, 458 U.S. 141, 153 (1982), and that federal agencies "may promulgate regulations that preempt state law." WFS Financial, Inc., v. Dean, 79 F. Supp. 2d 1024, 1026 (W.D. Wis. 1999). However, in the notes accompanying its promulgation of section 7.4006, the Commissioner notes that the OCC itself stated that the regulation "itself does not effect a preemption of any State law; it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable federal judicial precedent." 66 Fed. Reg. § 34784, 34790 (July 2, 2001). The Commissioner thus argues that the OCC itself has expressly disclaimed the regulation's preemptive force.[3]

This statement does not constitute a waiver by the OCC of any claim that the state laws at issue are preempted by federal law, or more specifically, of a claim that section 7.4006 itself may conflict with state law so as to spark a conflict preemption analysis. Rather, the OCC's statement mirrors the same position it took in its brief and at oral argument: that the regulation "clarifies" the preemption that the OCC already understood to exist from a combination of pre-existing statutes – section 484, section 24(Seventh), and section 371 – and case law interpreting those existing provisions. In sum, OCC contends, not that there is no

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[3] The OCC emphasizes that it nonetheless complied with all of the procedures required for promulgating a preemptive regulation. 66 Fed. Reg. at 34790. It should be noted, however, that the Supreme Court, in United States v. Mead Corp., 533 U.S. 218 (2001), suggested that where administration of the Act is concerned, the OCC need not in all circumstances comply with the requirements for issuing a preemptive regulation. Id. at 231.

preemption, but that the preemption existed prior to the enactment of section 7.4006, which merely codifies it.

This type of interpretation and extrapolation is precisely the type of interpretation with which an administrative agency is charged. See, e.g., Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). Thus, for purposes of conflict analysis, the court highlights section 7.4006 as the relevant conflicting regulation and treats the OCC's statement that this regulation "clarifies" and codifies preexisting law as a statement of the regulation's reasonableness, assessed in relation to the second step of the Chevron analysis, below.[4]

2. Chevron Analysis

Where the legitimacy of an agency regulation is in question, the court follows the two-prong analysis found in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). There, the Supreme Court instructed a court addressing a preemption claim to determine, first, whether Congress has spoken directly on the precise question at issue; if the intent of Congress is clear, it is dispositive and the inquiry ends. If, however, the statute is silent or ambiguous as to the specific issue, the court must next examine whether the agency's action is "based on a permissible construction of the statute." Id. at 843. The regulations of an agency charged with administering a statute will stand as long as its interpretation of the statute is "reasonable." Bell v. Reno,

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[4] The plaintiffs and the OCC have specifically disclaimed at oral argument that any preemption at issue here stems from any of the OCC's interpretive letters. See, e.g., OCC Interpretive Letter #957 (March 2003), Ex. 3, Mem. Amicus Curiae of OCC [Dkt. No. 43].

218 F.3d 86, 90 (2d Cir. 2000).

The plaintiffs argue that Congress is silent as to the specific issue here – namely, whether state real estate licencing schemes are preempted as to a mortgage-lending, operating subsidiary of a national bank – and that the OCC's application of the law to subsidiaries in the same way as to their parents is reasonable. They argue that section 7.4006 is in effect the codification of the logical implication of case law interpreting the statutory preemption effected by Congress's broad prohibition of state visitation over national banks, 12 U.S.C. § 484, and of the OCC's authority to oversee the activities of national banks undertaken pursuant to 12 U.S.C. § 24 (Seventh).

The Commissioner argues the opposite. He contends that Congressional intent is clear on the question presented here; specifically, that Congress made an express choice to preempt only as to national banks, not to related entities. He further contends that, even if that intent to preempt is unclear, the OCC's promulgation of section 7.4006 was outside its authority and is thus entitled to no deference, and in any case is unreasonable.

a. Congressional Intent.

In conducting a so-called "Chevron" analysis, the first question to be addressed is whether Congress has spoken to the "precise question at issue." Chevron, 467 U.S. at 842. In determining Congressional intent, the court employs the "traditional tools of statutory construction." Bell, 218 F.3d at 90 (quoting Chevron, 467 U.S. at 843 n.9). As such, the court "should not confine itself to examining a particular statutory provision in isolation" but,

in keeping with the basics of statutory construction, should instead place words or phrases "in context." Brown & Williamson, 529 U.S. at 132-33.

Here, the "precise question at issue" is whether state law should apply to a subsidiary of a national bank in the same way as it applies to the national bank itself. The Act's preemption is anchored in section 484, in which Congress explicitly provided that no "national bank" would be subject to any visitorial powers "except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). This provision does not speak expressly to subsidiaries of national banks. Indeed, as both sides conceded at oral argument, "subsidiaries" as they exist today were unknown at the time the Act was passed in the mid-nineteenth century.

As discussed above, Congress has since then implicitly recognized a national bank's authority to conduct its business through a subsidiary. See supra at 6-7. However, despite this implicit recognition of the use of subsidiaries to conduct banking business, Congress has nowhere spoken to the issue of state regulation of those subsidiaries. As a result, there is no explicit evidence of Congressional intent to preempt state regulation of those entities.

The Commissioner contends, however, that Congress has explicitly spoken to the issue through its treatment of national bank "affiliates." A portion of the Act added in 1933 by the Glass-Steagall Act, 48 Stat. 162, defines an affiliate as including a corporation owned or controlled by a national bank, 12 U.S.C. § 221a(b), and

gives the OCC authority to supervise those affiliates, 12 U.S.C. § 481.

That Act, however, but did not amend the preemption language of section 484 to include affiliates. The Commissioner argues that Wachovia Mortgage is "plainly" an affiliate of a national bank, and that, equally as plainly, Congress by omission intentionally declined to extend section 484 preemption to national bank affiliates.

While this argument has some superficial appeal, a closer look reveals that "affiliate" covers a much broader type of bank-related corporate entity than the operating subsidiaries at issue in this action, and further that an "operating subsidiary" like Wachovia Mortgage does not fit within that category.

The Glass-Steagall Act was one of several pieces of related legislation that provided for the protection of bank depositors in a number of ways. See also, e.g., Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. § 77a et seq; Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. § 78a et seq. It targeted specific abuses that Congress felt had led to the bank panics and closures that precipitated and characterized the Great Depression, especially the commingling of commercial and investment banks. See Indus. Assn. v. Bd. of Gov. of the Fed. Reserve Sys., 716 F.2d 92, 97-98 (2d Cir. 1983), aff'd, Sec. Indus. Assn. v. Bd. of Gov. of the Fed. Reserve Sys., 468 U.S. 137, 147 (1984) (Act's "design reflects the Congressional perception that certain investment banking activities are fundamentally incompatible with commercial banking").

One such abuse was the widespread use of bank deposits to underwrite "one security issue after another." United States v. Morgan, 118 F. Supp. 621, 645 (S.D.N.Y.

1953). Congress was also concerned about the "indirect pressure" that the affiliation of commercial banks with investment banks could cause, since "the pressure to sell a particular investment and to make the affiliate successful might create a risk that the bank would make its credit facilities more freely available to those companies in whose stock or securities the affiliate has invested or become otherwise involved." Investment Co. Inst. v. Camp, 401 U.S. 617, 631 (1971). As further assurance against improper transactions with associated firms of all types, the Glass-Steagall Act also amended the Federal Reserve Act, adding a requirement that loans to affiliates be "secured by collateral." Fitzpatrick v. Fed. Dep. Ins. Co., 765 F.2d 569, 573 (6th Cir. 1985).

Because of the Act, national banks were required to divest themselves of many affiliates. Morgan, 118 F. Supp. at 656 (discussing effect of the Act on J.P. Morgan & Co.). Despite these restrictions, however, the National Bank Act has continued to allow affiliates to conduct a range of business not permitted for a national bank itself. See, e.g., Sec. Indus. Assn. v. Bd. of Gov. of the Fed. Reserve Sys., 847 F.2d 890, 891-92 (D.C. Cir. 1988).

Congress's amendment of the National Bank Act to cover "affiliates" was thus directed at bank-related firms engaged in what Congress considered to be non-commercial bank functions, see, e.g., Blackfeet Nat'l Bank v. Nelson, 171 F.3d 1237, 1243 (11th Cir. 1999), not at operating subsidiaries conducting "the business of banking." First, both sides agree that modern subsidiaries, and more particularly, "operating subsidiaries" like Wachovia Mortgage, did not exist in 1933 and are thus different entities than the affiliates contemplated by Congress in the Glass-Steagall Act. Nor have operating subsidiaries been historically treated as "affiliates" of their

parent banks under section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, 371c-1, which are the key federal banking law provisions governing transactions between banks and thrift institutions and their non-bank affiliates. See, e.g., Ronald R. Glancz, Financial Services Modernization 2003: Implementation of the Gramm-Leach-Biley Act (Am. Law Inst. 2003). Finally, in the GLBA, Congress singled out only financial subsidiaries, not operating subsidiaries, for treatment as national bank affiliates in certain situations. 12 U.S.C. § 371c(e)(2). Since the GLBA authorizes financial subsidiaries to conduct certain non-national bank functions formerly forbidden, Congress's decision to treat those financial entities as "affiliates" subject to state regulation is consistent with Congress's decision in the Glass-Steagall Act to designate certain bank-related entities engaged, to some extent, in non-commercial bank functions as "affiliates."

This does not support the Commissioner's suggested inference that "affiliates" includes operating subsidiaries engaged in the business of banking. The Commissioner thus cannot successfully categorize such operating subsidiaries as national bank affiliates sufficient to support a determination under the first step of Chevron that Congress clearly intended to include national bank operating subsidiaries under the "affiliate" umbrella.[5]

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[5] The Commissioner also argues more generally that Congressional silence in section 484 as to all entities but "national banks" equates to a prohibition; in other words, that Congress definitively intended to limit preemption to "national banks" themselves. While this silence might have been significant to the court were it to interpret the statute de novo, it does not answer the question asked by the first step of Chevron – namely, whether Congress has

Congress thus has not addressed the manner in which state law should apply to a national bank operating subsidiary. As a result, this is a situation where "Congress has not directly addressed the precise question at issue." Chevron, 467 U.S. at 843.

b. Agency Interpretation.

Once the court has determined that Congress's intent on the "precise question at issue" is not clear or that the statute is silent, it "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." Chevron, 467 U.S. at 843. Instead, it must address whether "the agency's answer is based on a permissible construction of the statute." Id. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. at 844. This deference is appropriate because of the "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." Brown & Williamson, 529 U.S. at 132.

(i) OCC's Authority.

The Commissioner first argues that, because section 7.4006 is not within the OCC's authority, it is entitled to no deference. This argument is unavailing.

"unambiguously expr[ess] [its] intent." Chevron, 467 U.S. at 843. Silence does not equate to a prohibition. Instead, for Chevron purposes, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843

Though the OCC is not explicitly referenced in section 484, its authority is established in 12 U.S.C. § 1,[6] and it is charged with the administration of the Act and bears "primary responsibility for surveillance of 'the business of banking' authorized by 12 U.S.C. 24(Seventh)," NationsBank of North Carolina, 513 U.S. at 256.[7]

Here, the OCC clearly has authority under section 24(Seventh) to regulate the establishment of subsidiaries by national banks, as outlined in the regulations guiding subsidiary establishment. See 12 C.F.R. § 5.34. The Supreme Court has consistently accorded deference to the OCC's decisions regarding a national bank subsidiary. See NationsBank of North Carolina, 573 U.S. at 254 (brokerage subsidiary); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987) (deferring to the OCC with regard to a securities subsidiary); Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) (credit card subsidiary).

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[6] "The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director's jurisdiction under section 1462a(b)(3) of this title." 12 U.S.C. § 1.

[7] Further, it has administrative power pursuant to 12 U.S.C. § 1818 to issue cease and desist orders related to any national bank's violations of "law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank," or to prevent any "unsafe or unsound practice." First Union Nat'l Bank v. Burke, 48 F. Supp.2d 132, 137 (D. Conn. 1999).

Moreover, given Congress's charge to the OCC in 12 U.S.C. § 1818 to conduct surveillance of a national bank's compliance with any "law, rule, or regulation, or any condition imposed in writing by the agency," and to prevent any "unsafe or unsound practice" on the part of the bank, it is reasonable for the OCC to regulate the activities of national bank subsidiaries. As another court has observed, "it is plain that the Act delegated the OCC authority to promulgate 7.4006." Wells Fargo Bank, 265 F. Supp. 2d at 1170. The OCC has the authority to enact section 7.4006.

(ii) Reasonableness of § 7.4006.

The question for the court under the second step of Chevron is whether it was reasonable for the OCC to conclude, as it did in section 7.4006, that this OCC surveillance, as it applies to the activities here, should be exclusive and preemptive. This court concludes that it was.

An administrative agency's power to administer a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron, 467 U.S. at 843. "The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of [deference] with respect to his deliberative conclusions as to the meaning of these laws." Camp, 401 U.S. at 627.

Congress explicitly granted national banks the authority to engage in real estate lending in 12 U.S.C. § 371. It implicitly recognized their power to create operating subsidiaries engaged in the "business of banking" in the GLBA. 12 U.S.C. § 24a(g)(3). It further explicitly subjected financial subsidiaries to "affiliate" requirements,

while omitting operating subsidiaries from those requirements. 12 U.S.C. § 371c(e)(2). National banks thus have explicit Congressional authorization to engage in real estate activities, and implicit authorization to conduct national bank business through operating subsidiaries. Finally, the Commissioner concedes that the state would have no authority to enforce the statutes at issue against Wachovia Bank itself.

It is long-established that a state cannot regulate a national bank where doing so would "prevent or significantly interfere with the national bank's exercise of its powers." Barnett Bank, 517 U.S. at 33-34. Similarly, state regulations that "interfere[] with a power which national banks are authorized to exercise" irreconcilably conflict with the federal statute and are preempted by operation of the Supremacy Clause. Wells Fargo Bank of Texas, N.A. v. James, 321 F.3d 488, 491-92 (5th Cir. 2003). Thus, if a state regulation interferes with a national bank's operation of the business of banking through an operating subsidiary, a "power which national banks are authorized to exercise," that regulation is preempted.

State regulation of national bank wholly-owned subsidiaries could reasonably be conceived to have the same obstructive effect on national bank operations as they would if they were directed at the bank itself. If the state could regulate national bank subsidiaries like Wachovia Mortgage, it could, merely because of differences in corporate form, enforce regulations on activities which it could not regulate were they conducted through the bank itself. If, because of such regulation, the bank declined to utilize its ability to conduct its activity through the subsidiary, it would thus be hindered in its exercise of a recognized section 24(Seventh) "incidental" power. Wells Fargo Bank of Texas, 321 F.3d at 491-92. Section 7.4006 is

designed to prevent state actions, like the Commissioner's attempt to apply Conn. Gen. Stat. §§ 36a-486 and 36a-51's licencing requirements to Wachovia Mortgage, that hinder a national bank in the exercise of its authorized powers through a subsidiary.

In this case in particular, the Commissioner's threatened enforcement of the Connecticut statutes would interfere with two powers which the bank is authorized to exercise – the establishment of subsidiaries and the authority to engage in real estate lending. As the American Bankers Association argues in its brief amicus curiae [Dkt No. 42], the evolution of the banking industry, and specifically the mortgage-lending business, has resulted in a market structure which favors, if not necessitates, the subsidiary structure at issue here. As the Association explained, "because of the way that the residential home mortgage market has developed, the establishment of a separate operating subsidiary is the most efficient way for federally-chartered banking institutions to conduct the business of mortgage lending," and "restricting national bank's use of the operating subsidiary structure would frustrate their ability to compete and create greater risk for the bank's depositors and for the government." Id. at 6. Thus, the OCC's determination, that state regulation of operating subsidiaries to a greater extent than regulation of national banks themselves would potentially hinder the bank's "incidental" power, granted by regulation and implicitly acknowledged by statute, to conduct its banking business through a subsidiary, is reasonable.

The core of the Commissioner's argument, which focuses on the importance of allowing Connecticut to regulate the operations at issue here, is a policy one. While a state may have a legitimate interest in protecting mortgage lending abuses within its borders, that interest is

not before the court. Courts have repeatedly acknowledged that the Act's preemption of state law at times creates disparities between the national bank and state bank competitors, and may at times even create a competitive advantage in the national bank. See, e.g., First Union, 48 F. Supp. 2d at 138; see also Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954).[8]

Preemption, however, depends on the reasonableness of the OCC's interpretation of the statute, not on a court's assessment of the equities. That assessment is entrusted by Congress to the agency. The court will defer to the agency's decision "if [its] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." De La Cuesta, 458 U.S. at 154 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)). While the OCC's conclusion might not be the only conclusion that could be reached, the issue here is thus not how this court would interpret the statute in the first instance, or the policy choice that it would make, but whether the OCC's interpretation was "reasonable" or "permissible." As the Supreme Court cautioned in Chevron, "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." Chevron, 467 U.S. at

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[8] The subsidiaries at issue here, however, are covered by substantive OCC regulation. 12 CFR § 5.34.

866.

The court finds that section 7.4006 is a reasonable interpretation of the National Bank Act. Therefore, plaintiffs are entitled to a declaratory judgment that the Commissioner cannot enforce the Connecticut state laws in issue against Wachovia Bank's operating subsidiary, Wachovia Mortgage, in connection with the mortgage lending business of the latter.

C. Section 1983

Wachovia also asserts claims against the Commissioner under 42 U.S.C. § 1983 for deprivation of the rights granted to it by the National Bank Act. The state argues that Wachovia cannot maintain these claims because, while "the Supremacy Clause can be used to enjoin enforcement of a state statute that runs afoul of a federal legislative scheme, it does not provide a basis for a claim under section 1983." Def.'s Opp. and Cross-Motion for Summ. J. at 18-19 (quoting Western Air Lines v. Port Auth. of New York and New Jersey, 817 F.2d 222, 225-26 (2d Cir. 1987)).

The defendant correctly points out that just because a federal law preempts a state law does not mean that there is a right of action under § 1983. However, the plaintiffs' claim is different: they argue that they may use § 1983 to pursue vindication of the rights granted to them by the National Bank Act. The "mere coincidence that the federal law in question in this case contains its own preemption language does not affect" the analysis as to whether it may also provide the basis for an action under § 1983. Western Air Lines, 817 F.2d at 225-26.

The plaintiffs' claim thus implicates the tripartite

test of Blessing v. Freestone. 520 U.S. 329 (1997). Accordingly, this court must examine whether Congress "intended that the provision in question benefit the plaintiff"; whether "the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence"; and whether "the provision giving rise to the asserted right [is] couched in mandatory, rather than precatory, terms." Id. at 340-341 (internal quotation marks omitted).

1. Wachovia Bank

The first step in analyzing whether a private plaintiff can use § 1983 for enforcing an alleged federal "right" against a state is to determine "whether Congress *intended to create a federal right.*" Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (emphasis in original). For the statute to create such a right, it must "confer rights on a particular class of persons," id. at 285, and be "phrased in terms of the persons benefitted," id. at 284 (internal quotations omitted). The Supreme Court has emphasized that, because "[s]ection 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States . . . it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Id. at 283.

The National Bank Act was clearly intended to confer advantages on national banks like Wachovia, and, more particularly, the precise benefit of being free from state visitation. The statute explicitly provides, "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any

committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). As discussed supra, the statute does not explicitly discuss whether it intends to preempt state licensing of a national bank's mortgage-lending subsidiary, but it is reasonable and within the OCC's authority to interpret this preclusion against visitation to extend to that activity. No matter how "visitation" is defined, however, Congress clearly intended that national banks be subject to federal visitation only, except where specifically provided.[9]

Moreover, that advantage is a "right" within the meaning of § 1983. Whereas other statutes simply set forth a ban on certain conduct, here Congress expressly phrased § 484 with an "unmistakable focus on the benefitted class." Gonzaga, 536 U.S. at 287 (quoting Cannon, 441 U.S. at 690-93). Like the language in Titles VI and IX, which provides that "no person . . . shall . . . be subjected to discrimination," and has been found to confer enforceable rights, see Cannon v. Univ. of Chicago, 441 U.S. 677, 691 (1979), section 484 similarly decrees that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." 12 U.S.C. § 484. Here, Congress also made explicit its intent to alter the "usual constitutional balance between the states and the federal government." Gonzaga, 536 U.S. at 286 (quoting Will v. Michigan Dept. Of State Police, 491 U.S. 58, 65 (1989)). In light of these considerations, the court concludes that Congress intended to create a federal right vis-a- vis national banks.

Nor is this right "so 'vague and amorphous' that

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[9] Nor is there any administrative mechanism for enforcing that right. See Gonzaga, 536 U.S. at 280 (quoting Wright v. Roanoke Redev. and Housing Auth., 479 U.S. 418, 426 (1987)).

its enforcement would strain judicial competence." Blessing, 520 U.S. at 340-41. Rather, it is limited and concrete, providing a national bank with a cause of action under section 1983 only when its right to be free from unlawful visitation pursuant to section 484, as determined according to the applicable regulatory scheme, has been impinged upon.

Finally, section 484 is "couched in mandatory, rather than precatory, terms." Blessing, 520 U.S. at 340-341. Unlike the statute at issue in King v. Town of Hempstead, 161 F.3d 112, 115 (2d Cir. 1998), section 484 is not phrased in terms of "goals" or "objectives," but instead mandates that national banks may be subject to only those visitorial powers authorized by federal law. This satisfies the third prong of the Blessing test.

2. Wachovia Mortgage

Wachovia Mortgage's ability to pursue a section 1983 claim is less clear. Wachovia Mortgage derives its injured "right" not from statute itself, but from regulation, section 7.4006. The courts of appeal are divided on whether a regulation can create a federal right enforceable through section 1983, though the recent trend is to find that an agency regulation, alone, cannot create a 1983 right. Compare Save Our Valley v. Sound Transit, 335 F.3d 932, 940 (9th Cir. 2003) (action can be maintained under regulations only where right is created by statute, and merely defined in scope by regulations); S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771, 784 (3d Cir. 2001); Harris v. James, 127 F.3d 993, 1008 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) (regulation cannot create enforceable § 1983 interest not already implicit in the enforcing statute); with Loschavo v. City of Dearborn, 33 F.3d 548, 553 (6th

Cir. 1994) (regulation can create federal right for purposes of § 1983); and with Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985). The Second Circuit has declined to reach this issue. King, 161 F.3d at 115.

The Supreme Court has emphasized that cases involving rights of action pursuant to section 1983 are not separate and distinct from those discussing rights of action implied from other statutes. See Gonzaga, 536 U.S. at 283. While the inquiries are different, the Court emphasized that the first step is the same, "in either case, we must first determine whether Congress intended to create a federal right." Id. (emphasis added); see also Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("like substantive federal law itself, private rights of action to enforce federal law must be created by Congress"); Save Our Valley, 335 F.3d at 938-40 (discussing Supreme Court's implied right of action and section 1983 jurisprudence).

It cannot be said, however, that Congress affirmatively intended the interest that section 7.4006 confers on national bank subsidiaries. See Save Our Valley, 335 F.3d at 940 (action can be maintained under regulations only where right is created by statute, and merely defined in scope by regulations); Smith, 821 F.2d at 984. As examined at length in relation to step one of Chevron, the statutes here are silent with respect to national bank operating subsidiaries. It thus cannot be said that Wachovia Mortgage's "right" was created by the National Bank Act itself. Rather, that "right" was created as to Wachovia Bank, through section 24(Seventh). Section 7.4006 defines the scope of that right as to Wachovia Bank and other national banks, and is a reasonable exercise of the OCC's authority in its visitorial authority over such banks. However, while reasonable, the regulation does not create a statutory right as to Wachovia Mortgage, enforceable under

section 1983.

III. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment [Dkt. No. 11] is GRANTED on both the preemption claim and Wachovia Bank's § 1983 claim. The Defendant's Cross-Motion for Summary Judgment [Dkt. No. 21 is DENIED, except as GRANTED on Wachovia Mortgage's § 1983 claim. **SO ORDERED.**

Dated this 1st day of June, 2004, at Bridgeport, Connecticut.

/s/ Janet C. Hall
Janet C. Hall United States District Judge

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No. 05-431

In the Supreme Court of the United States

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit correctly held that the Office of the Comptroller of the Currency ("OCC") acted within the bounds of its delegated authority when it determined that the incidental powers of a national bank include the power to carry out the business of banking through operating subsidiaries that are subject to the same terms and conditions, including the exclusive licensing and visitorial authority of the OCC, as the banks themselves?

CORPORATE DISCLOSURE STATEMENT

Wachovia Bank N.A. and Wachovia Mortgage Corporation state as follows: (1) Wachovia Bank, N.A. is owned by Wachovia of Alabama, Inc., which in turn is owned by Wachovia Corporation, a financial services holding company publicly traded on the New York Stock Exchange; and (2) Wachovia Mortgage Corporation is owned by Wachovia Bank, N.A.

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Respondents, Wachovia Bank, N.A. ("Wachovia Bank") and Wachovia Mortgage Corporation ("Wachovia Mortgage"), respectfully request that this Court deny the petition for a writ of certiorari. In this case, the Second Circuit — in accord with every other court to address the issue — held that state attempts to regulate the operating subsidiaries of national banks are preempted by the National Bank Act and OCC regulations. It is not necessary for this Court to review that decision. The issue of administrative law that is presented by the petition was neither raised below nor addressed by the court of appeals. There is no conflict in the circuits on the questions presented here. The holding below, which affirmed the reasonableness of a well-considered agency regulation, plainly is correct. The petition for a writ for certiorari accordingly should be denied.

COUNTER-STATEMENT OF THE CASE

This case concerns the powers of national banks and the authority of their federal regulator, the OCC. Respondents challenged six Connecticut statutes that directly interfere with Wachovia Bank's ability to conduct banking business through its operating subsidiary, Wachovia Mortgage. The Connecticut statutes conflict with regulations that the OCC adopted under the National Bank Act ("NBA").

The NBA establishes nationally chartered banks, to which it grants, among other things, "all such incidental powers" that are necessary to conduct the business of banking. 12 U.S.C. § 24 (Seventh). The NBA further provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). Since 1966, the OCC has recognized that national banks have the incidental power to conduct the business of banking through operating subsidiaries. 31 Fed. Reg. 11,459, at 11,459-60 (Aug. 31, 1966).

The OCC has "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh" and has the power to promulgate regulations that define "incidental powers" of national banks. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995); 12 U.S.C. § 93a. Pursuant to this authority, the OCC has promulgated regulations providing that:

- the OCC has exclusive visitorial authority over national banks (12 C.F.R. § 7.4000);[1]
- a national bank "may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking" (12 C.F.R. § 5.34(e)(1));
- an operating subsidiary may conduct "activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank" (12 C.F.R. § 5.34(e)(3));
- the standards for real estate lending, as authorized by 12 U.S.C. § 371(a), apply to loans provided by "national banks and their operating subsidiaries" (12 C.F.R. § 34.1);
- a national bank may make real estate loans without regard to specified types of State laws that "obstruct, impair, or condition a national bank's ability to fully

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[1] "Visitorial authority" refers to the power to examine a bank, inspect its books and records, regulate and supervise its activities authorized by federal banking law, and enforce compliance with applicable state and federal laws concerning those activities. 12 C.F.R. § 7.4000(a)(2)(i)-(iv).

exercise its Federally authorized real estate lending powers" (12 C.F.R. § 34.4); and

- "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank" (12 C.F.R. § 7.4006).

When the OCC recently revised some of its regulations, it explained that increasing state banking regulations had hindered "national banks' ability to conduct operations to the full extent authorized by Federal law." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004). The OCC further explained that its responsibility for the "safe and sound operations" of national banks was central to its promulgation of these regulations. *Id.* at 1907.

In the face of this federal framework, Connecticut sought to use six banking statutes to regulate mortgage lenders operating in the State. Two statutes required first and second mortgage lenders — exempting national banks but not their operating subsidiaries — to obtain state licenses; two required mortgage lenders to maintain certain records and make them available for inspection by the Petitioner; and two empower the Petitioner to enforce these laws with, *inter alia*, cease and desist orders. Conn. Gen. Stat. §§ 36a-50, 52, 486, 487, 493, 511, 516.

Respondents challenged Petitioner's exercise, as against operating subsidiaries of national banks, of the regulatory authority purportedly granted in these Connecticut statutes, which conflict with the federal regulatory framework described above. Affirming the District Court's grant of summary judgment, the Second Circuit properly held that the OCC regulations, including § 7.4006, "reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with

national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 321 (2d Cir. 2005). (App. at A-28.) The court also identified independent bases for preemption in 12 C.F.R. §§ 34.1(b) and 34.4, which provide that the regulations apply to both national banks and operating subsidiaries and that state laws that interfere with a national bank's real estate lending activities do not apply to national banks. 414 F.3d at 321. (App. at A-27.) Accordingly, the Second Circuit deferred to the OCC's interpretation of the NBA's policy choices, in which the OCC's regulations are grounded, and expressly rejected the notion that it was deferring to the OCC's legal interpretation of the preemptive force of its regulations. 414 F.3d at 320. (App. at A-25-26.) On the basis of this analysis, the Second Circuit held that the NBA and OCC regulations preempted the conflicting Connecticut statutes.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to resolve a supposed conflict among the courts of appeals by deciding whether the OCC's view "as to the preemption of state law under the National Bank Act [is] entitled to judicial deference." (Pet. at i.) The Petition should be denied for three reasons. First, the principal issue on which Petitioner seeks review was not raised below by Petitioner or addressed by the Second Circuit, and, therefore, it was not properly preserved for review by this Court. Second, there is no conflict among the Circuits, or among any other courts, with regard to the issues that the court of appeals actually decided and that this case presents. Petitioner's manufactured conflict, arising from a misreading of the Second Circuit's decision, does not provide an appropriate basis for this Court's review. Finally, for the reasons set forth in the opinions of the Second and Ninth

Circuits and of the four district courts to have considered the issue actually presented, the decision below is correct.

A. The First Issue For Which Petitioner Seeks Review Was Not Raised Below.

The first question presented in the petition raises "the question whether judicial deference should be accorded an agency opinion on preemption." Pet. 11-12. In particular, the Petitioner claims that the Second Circuit departed from other circuits by "[a]pplying the deferential standard of *Chevron U.S.A., v. Natural Resources Defense Council*, 467 U.S. 837 (1984)" to the preemption issues raised in this case. Pet. 11. Petitioner, however, never denied below that the principles articulated in *Chevron* should guide the decision here. Accordingly, to the extent that Petitioner now seeks to challenge the appropriateness of applying the *Chevron* framework, that challenge should be rejected as unpreserved.

Petitioner argued below that the *Chevron* framework supported its argument that the OCC's view of the preemptive scope of the NBA was not entitled to judicial deference, contending only that the OCC misunderstood the meaning of the NBA. In its briefs to the Second Circuit, Petitioner properly characterized *Chevron* as "the seminal case," citing it extensively and applying its analysis to advocate rejection of the OCC's interpretation of the NBA, without ever arguing that *Chevron* should not apply. (Pet'r's Second Circuit Br. at 29-34; Pet'r's Second Circuit Reply Br. at 1-15.) The Second Circuit therefore noted that "[n]either party has questioned that the *Chevron* framework generally applies in this case." 414 F.3d at 315 n.6. (App. at A-15-16.)

In the Petition, however, Petitioner shifts his position, now challenging the applicability of *Chevron* and arguing that the Second Circuit improperly limited its inquiry to whether the OCC's view of preemption was reasonable. (Pet. at 11.) Petitioner would have this Court decide whether

Chevron deference analysis is proper at all, where, as Petitioner argues, it is solely the agency's view of preemption — a purely legal question as to which Petitioner asserts the OCC has no special expertise — that is at issue.

This Court does not permit parties to raise new arguments in their petitions for certiorari, and Petitioner's attempt to do just that should be rejected. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 54-56 (2002); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990). Having never challenged the applicability of *Chevron* below and, to the contrary, having relied extensively on the *Chevron* deference analysis in support of his argument that the OCC's view of preemption was not reasonable and was, therefore, not entitled to deference,[2] Petitioner cannot now argue that the Second Circuit should not have applied the *Chevron* framework.

B. There Is No Conflict Among The Courts Of Appeals, Or Any Other Courts, On The First Question Presented.

Petitioner seeks to manufacture a conflict among the courts of appeals by asserting that the Second Circuit decided a question it did not, in fact, decide: whether to defer to the OCC's position on the purely legal question of the preemptive scope of the NBA and the OCC's regulations vis-à-vis state laws purporting to regulate national banks' operating subsidiaries. Petitioner then mischaracterizes the decision below as inconsistent with other courts of appeals' decisions about the level of deference to which agency assertions of preemptive scope are entitled.

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[2] For example, Petitioner asserted below: "Section 7.4006 is premised on an unreasonable interpretation of the National Bank Act's provisions and is entitled to no deference from this Court. Under the seminal case of *Chevron* ..." (Pet'r's Second Circuit Br. at 29.)

1. *The Second Circuit's Decision Did Not Turn On Deference To The OCC's View On Preemption.*

In support of his attempt to manufacture a circuit conflict, the Petitioner misreads the Second Circuit's evaluation of one regulation, 12 C.F.R. § 7.4006, and ignores the independent, alternative bases for the court's holding grounded upon two other regulations.

First, the Second Circuit flatly rejected Petitioner's characterization of § 7.4006 as embodying only a legal interpretation of preemption case law and, instead, noted that § 7.4006 "at its core, reflects a policy judgment about national banks' use of operating subsidiaries." 414 F.3d at 320. (App. at A-25.) The Second Circuit then determined that the OCC's policy judgment was reasonable, in that § 7.4006 reflected "the OCC's position that national banks should be able to 'use the operating subsidiary as a convenient and useful corporate form for conducting activities' without substantial restrictions imposed by states." 414 F.3d at 320. (App. at A-25.) The Court of Appeals quoted the OCC's expression of the negative effect of "multiple, often unpredictable, different state or local restrictions" on national banks. 414 F.3d at 321. (App. at A-27.) Moreover, the court acknowledged the reasonableness of "the OCC's policy judgment that national banks' use of operating subsidiaries as separately structured corporate entities is desirable and that it should not be hindered by state regulations." 414 F.3d at 319. (App. at A-23.)

The Second Circuit recognized that Petitioner's challenge to the OCC's regulations centered on his disagreement with the OCC's policy choices; for example, the Second Circuit described Petitioner as arguing "that this rationale [underlying §7.4006] unreasonably disregards the corporate separateness of a parent bank and improperly allows national banks to take advantage of the legal benefits of conducting business through a subsidiary..." 414 F.3d at 318. (App. at

A-22-23.) The Second Circuit admonished Petitioner that such policy arguments should be directed to Congress, not to the courts.[3]

Second, the Second Circuit determined that, even if § 7.4006 were not imbued with the OCC's reasonable interpretation of the policy choices underlying the NBA, thus making deference to it appropriate under *Chevron*, two other regulations, sections 34.1(b) and 34.4, "independently support a finding of preemption in this case." 414 F.3d at 321. (App. at A-27.) Section 34.1(b), which by its terms provides that it applies to national banks and operating subsidiaries, states that the purpose of the regulations is to set standards for real estate-related lending and associated activities by national banks; section 34.4 provides that, unless otherwise provided by federal law, state laws that interfere with a national bank's ability to exercise its real estate lending powers do not apply to national banks. These independent bases for preemption arise from these two sections because the regulations reflect the OCC's view that the NBA embodies a substantive policy choice that national banks and their operating subsidiaries must be able to "operate under uniform, consistent, and predictable standards," unimpeded by the vagaries of state law. The Second Circuit concluded that this policy choice was

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[3] It is noteworthy that, despite Petitioner's rhetoric about "the growing and potentially ruinous problem of predatory lending" that will result from the Second Circuit's decision (Pet. at 10), the six challenged Connecticut statutes are not substantive in nature, that is, they concern only licensing and visitorial authority and are not consumer protection laws. Moreover, it is the OCC, not state officials, that has responsibility for enforcing applicable state laws, to the extent they are not preempted, against national banks. *See Nat'l State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980).

reasonable. 414 F.3d at 320 (citing 69 Fed. Reg. at 1907 (Jan. 13, 2004)). (App. at A-27.)

The OCC's reasonable determinations, based on the NBA and reflected in federal regulations, form the backdrop for the Second Circuit's ruling. In light of its understanding of federal law and the business of banking, the OCC concluded that national banks must be able to make unimpeded use of operating subsidiaries to conduct core banking activities, including mortgage lending. In deference to the OCC's substantive analysis, the Second Circuit held that Petitioner's effort to assert licensing and visitorial authority over operating subsidiaries of national banks conflicted with federal law.

2. *The Second Circuit's Decision Does Not Conflict With The Tenth and Eleventh Circuit Decisions Cited By Petitioner.*

The decisions from the Tenth and Eleventh Circuits that Petitioner cites as conflicting authority are not, in fact, inconsistent with the Second Circuit's decision below because they do not suggest that courts should refuse to defer to an agency's reasonable interpretation of the meaning of the statutes and regulations within its purview. Rather, the Tenth and Eleventh Circuit cases hold that deference to an agency's purely legal interpretation as to preemption is not appropriate, an issue the Second Circuit did not address, as discussed above.

In *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1300-01 (11th Cir. 2005), the parties disagreed over the FDIC's position on preemption. Without resolving that dispute, the Eleventh Circuit observed that it would not defer to the FDIC's opinion, whether formal or informal, because only an agency's substantive interpretations of the meaning of a statute warrant deference. The Tenth Circuit, in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571,

1578-79 (10th Cir. 1991), faced a regulation that codified the judicially-created test for preemption. The court held that, although the substance of the Secretary of Transportation's opinion regarding the subject matter of its regulations was entitled to deference, the court must make its own legal determination of preemption.

Both the *Harmon* decision and the *Baker* decision flow from this Court's approach in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996). The rulings distinguish between agency opinions on the substantive meaning of regulations — which are entitled to deference — and agency opinions on the preemptive scope of regulations — which are not entitled to deference. So, too, by deferring to the OCC's substantive views, the Second Circuit's decision below adhered to *Smiley* and was not inconsistent with *Harmon* or *Baker*.

Because the Second Circuit below did not, as Petitioner suggests, decide the propriety of deferring to a purely legal interpretation of the preemptive scope of the statute or regulation at issue, the cases Petitioner cites as inconsistent on that undecided issue do not, in fact, conflict with the decision below. Accordingly, the split among the courts of appeals that Petitioner asserts does not exist.

C. The Second Circuit Properly Concluded That The National Bank Act And OCC Regulations Preempt State Law.

The Second Circuit's decision was correct on the merits and does not warrant review by this Court. All courts that have considered the question actually presented in this case — "whether the NBA and OCC regulations preempt state banking laws concerning operating subsidiaries of nationally chartered banks" (414 F.3d at 309 (App. at A-4)) — have decided the issue in the same way the Second Circuit did below.

In the only other court of appeals decision on this issue, the Ninth Circuit held, in *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 954 (9th Cir. 2005),[4] that the NBA preempts "the California Commissioner of Corporations' ... exercise of investigative and licensing authority over 'operating subsidiaries' of national banks." The court determined that the OCC had authority not only to allow national banks to create operating subsidiaries that perform national bank functions, but also to regulate operating subsidiaries of national banks. The Ninth Circuit held that the OCC's regulations permissibly reserved visitorial power over operating subsidiaries of national banks to the OCC. 419 F.3d at 964.

The *Boutris* analysis was guided by the *Chevron* framework. The Court held that the OCC's interpretations of the NBA were entitled to deference because of the close relationship between the OCC's substantive policy determinations and its preemption regulation. In other words, "§ 7.4006 is 'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" 419 F.3d at 963 (citations omitted).

Similarly, the four district courts to have decided the issue presented in this case have decided in favor of preemption by the OCC's regulations of state laws that seek to regulate operating subsidiaries of national banks. *Office of the Comptroller of the Currency v. Spitzer*, No. 05 Civ. 5636, 2005 U.S. Dist. LEXIS 23209 (S.D.N.Y. Oct. 12, 2005) (granting declaratory and injunctive relief to OCC to preclude New York Attorney General from enforcing certain state banking laws against national banks or their operating subsidiaries, on the ground that the state laws conflict with

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[4] The Ninth Circuit decided *Boutris* shortly after the Second Circuit decided this case.

and are preempted by NBA and OCC's reasonable regulations); *National City Bank v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) (holding that Maryland banking laws purporting to authorize state banking commissioner to exercise licensing and visitorial authority over operating subsidiaries of national banks are preempted by NBA and OCC's regulations); *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004) (rejecting challenge to OCC's regulations as unreasonable and holding that Michigan statutes that conflict with OCC's regulations are preempted); *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003), *aff'd in part*, 419 F.3d 949 (9th Cir. 2005). No court has decided the issues actually addressed by the Second Circuit below in a contrary manner.

The Second Circuit properly concluded below that the OCC's regulations reflected a reasonable policy choice to protect the "safe and sound operations" of national banks and their operating subsidiaries by eliminating the disruption of inconsistent state banking laws. 414 F.3d at 319-21. (App. at A-22-28.) Aside from differing about the wisdom of this policy,[5] Petitioner offers no basis for challenging the

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[5] Petitioner argues at considerable length that Connecticut's statutes should not be preempted because "[t]he regulation of operating subsidiaries … is a matter of vital importance to states." Pet. at 15; *see id.* at 15-20. For reasons noted above in footnote 3, petitioner is incorrect in arguing that consumers will be left without protection if the Connecticut laws at issue here are preempted. But this argument is, in any event, wrong on its own terms: it has long been settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fid. Fed. Sav. and Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Indeed, even where the state has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is

propriety of the Second Circuit's decision on the merits of the dispute. This case does not present, therefore, a basis for this Court's review, and the petition should be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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derived, any state law, ... clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (plurality opinion) (internal quotation marks and citations omitted).

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No. 05-431

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In The

Supreme Court Of The United States

JOHN P. BURKE, in his official capacity as the Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED FOR REVIEW

1. Is the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act entitled to judicial deference?

2. Do the provisions of the National Bank Act and the regulations promulgated thereunder by the Office of Comptroller of the Currency preempt state law licensing and regulatory authority over state-chartered operating subsidiaries of national banks?

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INTRODUCTION

The petitioner, John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut, respectfully submits this supplemental brief in reply to the Brief of the United States as Amicus Curiae submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. Particularly as to the merits, the United States' amicus brief does little more than parrot the arguments of the respondents, entities that are subject to the regulatory authority of the Office of the Comptroller of the Currency (OCC) under the National Bank Act. Nonetheless, the petitioner takes this opportunity to respond briefly to an issue of paramount importance to the States that the United States unfortunately and unwarrantedly belittles: Whether the doctrine of judicial deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), should be applied to an agency's self-interested interpretation of the scope of its preemptive authority granted by Congress.

ARGUMENT

I. THE OCC'S SELF-INTERESTED INTERPRETATION OF THE SCOPE OF ITS PREEMPTIVE AUTHORITY DOES NOT DESERVE JUDCIAL DEFERENCE.

Judicial review of the scope of an agency's preemptive authority should not be limited to evaluating merely whether the agency's view of its own preemptive authority is unreasonable. Preemption of state law invariably raises fundamental issues of federalism, and federal agencies have

neither any special competence nor the institutional incentive to respect the interests of States in addressing the scope of congressionally authorized preemption.

The United States is wrong in asserting that the petitioner did not raise the issue of *Chevron*'s application to an agency's view of the scope of its preemptive authority. U.S. Br. 18. The petitioner specifically argued below that *Chevron* should not apply to the regulation, which effectively is nothing more than a statement of the OCC's prediction of how the courts would decide the issue. *See* Pet. App. A24-A25; Pet. C.A. Br. 35-36.

Similarly, the United States is wrong in dismissing the presence of an inter-circuit split of authority. U.S. Br. 19-20. Contrary to the United States' assertion that the court of appeals below did not apply *Chevron* deference in upholding § 7.4006, *id.* at 20, the court explicitly stated that it "must defer to the regulations if they reflect a reasonable construction of the statutory scheme." Pet. App. A22. This stands in stark contrast to the Tenth Circuit's approach in *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), in which the court declined to defer to an agency's view of preemption.

The United States attempts to distinguish *Harmon* on the basis that the agency interpretation at issue there involved implied conflict preemption. U.S. Br. 20. That is a distinction without a difference. Indeed, the rationale offered by the Tenth Circuit for eschewing deference – that "a preemption determination involves matters . . . more within the expertise of the courts than within the [agency's] expertise," *Harmon*, 951 F.2d at 1579 – had nothing to do with the category of preemption involved but rather the legal nature of the inquiry. By contrast, the Second Circuit

concluded that the preemption determination in this case should be treated like any other agency policy decision to which it must defer.[1] Pet. App. A23-A25.

Finally, the United States is wrong in suggesting that this issue is controlled by the Court's decision in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). U.S. Br. 18. In *de la Cuesta*, this Court suggested that when an agency's regulation intends to preempt state law, a "narrow focus on Congress' intent to supersede state law [is] misdirected." *de la Cuesta*, 458 U.S. at 154. However, the Court also unequivocally reaffirmed, both in *de la Cuesta* and in numerous cases thereafter, that the scope of an agency's preemptive authority remains a question of congressional, not agency, intent. *Id.* at 153-54; *Gonzalez v. Oregon*, 126 S.Ct. 904, 916 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, what is definitely not "misdirected" is an inquiry into whether the agency's action is within the scope of its delegated authority. As the Court just recently

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[1] The petitioner acknowledges that the other decision cited in his petition as reflecting a split among the circuits – *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), *vacated as moot*, 2006 U.S. App. Lexis 10580 (11th Cir. Apr. 28, 2006) – has since been vacated on other grounds as moot. Nonetheless, the United States' effort to distinguish the holding of *BankWest* is unpersuasive. The United States contends that *BankWest* only held that deference is not owed to an agency's informal view of preemption, as opposed to that articulated in a regulation. U.S. Br. 19-20. Again, for purposes of establishing the standard of judicial review, that is a distinction without a difference. As in *Harmon*, the court's decision not to defer to the agency depended not on the form of the agency's view, but rather on the nature of the inquiry and the judicial competence to resolve preemption questions. *BankWest*, 411 F.3d at 1301 ("[W]e do not defer to agency positions, ***whether formal or informal***, on preemptive issues." (emphasis added)).

emphasized in *Gonzalez v. Oregon*, an agency's interpretation receives deference under *Chevron* only when an agency has acted within the scope of its congressionally delegated authority. 126 S.Ct. at 916; *accord Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

The regulation at issue in *de la Cuesta* was a substantive one – specifically, a rule on the ability of a federal savings and loan to include a due-on-sale clause in a loan instrument. The Court concluded that the promulgation of that regulation was well within the exceedingly broad scope of that agency's preemptive authority. *de la Cuesta*, 458 U.S. at 161-63. Because the regulation was within the scope of the congressionally delegated preemptive authority – as determined by an ordinary exercise of interpretation of the statutory text and congressional intent, *id.* at 159-64 – the Court concluded that was no need to identify a specific congressional intent to preempt state law on that specific issue. *Id.* at 163.

By contrast, the regulation at issue in this case is not a substantive one; rather, it purports to define the scope of the agency's delegated preemptive authority. Indeed, in promulgating the 12 C.F.R. § 7.4006, the OCC pointedly stated that the regulation "itself did not effect preemption of any State law;" but instead the regulation only reflected the OCC's view of how the federal courts would rule as to the scope of the National Bank Act's preemptive scope. 66 Fed. Reg. 34784, 34790 (July 2, 2001).

The United States fails to accept the significance of this. The issue that § 7.4006 addresses is ***not*** "the substantive scope of the 'business of banking' conducted by national banks," U.S. Br. 19, to which the courts must defer to the reasonable policy judgments of an agency

given preemptive authority by Congress. Rather, it purports to define the scope of the agency's preemptive authority. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996). The reasonableness or soundness of an agency's policy judgments as to the scope of preemption are irrelevant. What is at stake is whether the agency has exceeded its delegated preemptive authority, and as to that question no judicial deference is accorded. *Gonzalez*, 126 S.Ct. at 916; *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

In *Chevron*, the Court articulated two justifications underlying the doctrine of deference that now bears its name: first, that agencies have superior expertise in the area of regulation delegated to them than the courts; and second, that agencies, as part of the politically accountable executive branch, are better suited to resolve competing policy questions left to them by Congress. *Chevron*, 467 U.S. at 865. Both of these justifications, grounded in concerns of separations of power and judicial competency, are highly attenuated when the issue is the scope of an agency's preemptive authority.

Determining the scope of preemptive authority that Congress delegated to an agency is not the sort that requires technical expertise that agencies have and courts lack. After all, the scope of an agency's preemptive authority is answered by "interpreting the statute to determine whether Congress has given the [agency] the power to act as it has." *New York v. FERC*, 535 U.S. 1, 18 (2002). This is a task that courts perform every day, and agencies have no special competency to decide such questions.

In fact, there is compelling evidence to suggest that agencies are less competent than courts to resolve such

issues in a way that also undermines the assumption that agencies are more politically accountable and thus better suited to resolve competing policy interests. The question of the scope of an agency's preemptive authority can go to the heart of the agency's power, and there is every reason to believe that agency self-interest will outweigh the federalism values intrinsic to questions of preemption. *See* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 785-96 (2004); authorities cited in Pet. 14-15.

Chevron deference is simply ill-equipped for such circumstances. Courts should therefore address agency interpretations of the scope of preemption without according those interpretations the deference given other agency decisions.

II. BY ADVOCATING FOR JUDCIAL DEFERENCE TO THE OCC'S INTERPRETATION OF PREEMPTION UNDER THE NATIONAL BANK ACT, THE UNITED STATES SUPPORTS THE OCC'S EFFORTS TO REWRITE THE LIMITS CONGRESS HAS PLACED ON STATE VISITORIAL AUTHORITY.

The views expressed by the United States effectively would permit the OCC to rewrite the National Bank Act and specifically the meaning of the term "national bank" as used in 12 U.S.C. § 484. To avoid the obvious – that an operating subsidiary of a national bank is not itself a national bank – the United States asserts that the OCC did not interpret the meaning of "national bank" to include operating subsidiaries but rather merely interpreted that the use of operating subsidiaries was within the "incidental powers" of a national bank under 12 U.S.C. § 24(Seventh). U.S. Br. 14-15.

The petitioner has not contested a national bank's authority under the National Bank Act to own and operate an operating subsidiary. It does not follow, however, that simply because a national bank has such authority that the OCC can by regulation extend the preemption of state law to operating subsidiaries. The United States argues that "[n]othing in the text of the statute precludes" the OCC's view that the States should be preempted from exercising regulatory authority over operating subsidiaries. U.S. Br. 15. The statutory framework belies that assertion. The National Bank Act unambiguously defines a national bank and an affiliate of a national bank, and there is no dispute that an operating subsidiary is an affiliate and not a national bank. 12 U.S.C. §§ 26, 27, 221, 221a. The National Bank Act's statutory framework unambiguously treats the regulation of a national bank and its affiliates separately, preempting certain state laws as to national banks but not as to affiliates. 12 U.S.C. §§ 371, 481, 484(a). *See* Pet. 23-26.

Against this statutory backdrop, it is nothing more than an administrative bootstrap to conclude that, because the use of an operating subsidiary is an incidental power of a national bank, the preemption of visitorial authority as to national banks established by Congress extends also to operating subsidiaries. Whether or not such an extension of preemptive authority is a "reasonable conclusion," U.S. Br. 15, is not the question where, as here, the statutory language, as interpreted through the ordinary rules of statutory construction, cannot bear the weight of the agency's interpretation. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000);

MCI Telecom. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994).

In the guise of judicial deference, the United States asks that this Court accede to the OCC's rewriting of the National Bank Act. Given the significance of enabling an administrative agency to exceed its congressionally delegated authority at the expense of otherwise validly enacted state law, this Court should step in to resolve this important issue.

CONCLUSION

The petitioner respectfully submits that his Petition should be granted and a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETITIONER,
JOHN P. BURKE, in his official capacity as Banking Commissioner of the State of Connecticut

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No. 05-431

In the Supreme Court of the United States

JOHN P. BURKE, BANKING COMMISSIONER, CONNECTICUT DEPARTMENT OF BANKING, PETITIONER

v.

WACHOVIA BANK, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether regulations issued by the Comptroller of the Currency to implement the National Bank Act, 12 U.S.C. 21 *et seq.*, validly preempt the enforcement of state laws regulating mortgage lending activity by an operating subsidiary of a national bank.

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In the Supreme Court of the United States

No. 05-431

JOHN P. BURKE, BANKING COMMISSIONER, CONNECTICUT DEPARTMENT OF BANKING, PETITIONER

v.

WACHOVIA BANK, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, is responsible for administering the National Bank Act (the Act), 12 U.S.C. 21 *et seq.*, and overseeing the national banking system. The OCC's chief officer, the Comptroller of the Currency, is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a.

a. The National Bank Act generally preempts state regulation of national banks, *i.e.*, banks chartered under the Act. Specifically, the Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Fed-

eral law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress." 12 U.S.C. 484(a). The term "visitorial powers" in Section 484(a) encompasses "[e]xamination of a [national] bank," "[i]nspection of a bank's books and records," "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2)(i)-(iv). The Comptroller's regulations implementing Section 484(a) provide that, subject to certain exceptions, only the OCC or an OCC-authorized representative may exercise visitorial powers over national banks. 12 C.F.R. 7.4000(a). In particular, "[s]tate officials may not exercise visitorial powers with respect to national banks." *Ibid.*

b. The National Bank Act provides that national banks "shall have power" to exercise certain enumerated functions, 12 U.S.C. 24, and also grants national banks "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 Seventh. "[T]he Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh," *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995), including the authority to define "incidental powers" that are "necessary" for a national bank "to carry on the business of banking," 12 U.S.C. 24 Seventh; see *Nationsbank*, 513 U.S. at 258-260, 264.

The Comptroller has long recognized as one such "incidental power" the authority of a national bank to carry out its functions through an "operating subsidiary." See 12 C.F.R. 5.34. An operating subsidiary is a subsidiary in which a national bank has a controlling interest, and that engages solely in activities "that are permissible for a national bank to engage in directly." 12 C.F.R. 5.34(e); *Wells Fargo Bank N.A.* v. *Boutris*, 419 F.3d 949, 957 (9th Cir. 2005). An operating

subsidiary exercises its functions "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. 5.34(e)(3). Operating subsidiaries are treated as consolidated with the parent bank for purposes of applying many statutory and regulatory provisions, including various accounting and reporting requirements. See 12 C.F.R. 5.34(e)(4).

The rule that an operating subsidiary carries out its functions "pursuant to the same * * * terms and conditions that apply to the conduct of such activities by its parent national bank," 12 C.F.R. 5.34(e)(3), necessarily determines the extent to which the "terms and conditions" of state laws may be applied to an operating subsidiary. Reflecting that principle, the Comptroller has promulgated a regulation stating that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. 7.4006.

c. The National Bank Act specifically authorizes national banks to engage in real estate lending activity. 12 U.S.C. 371(a) (national banks may "arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe"). The Comptroller, in exercising his authority under that provision, has promulgated regulations "to set forth standards for real estate-related lending and associated activities by national banks." 12 C.F.R. 34.1(a).

The regulations governing real estate lending activities explicitly apply both "to national banks and their operating subsidiaries." 12 C.F.R. 34.1(b). Those regulations establish that, "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lend-

ing powers do not apply to national banks." 12 C.F.R. 34.4(a). The regulations specify that state "licensing" requirements are among the state laws that are inapplicable to national banks and operating subsidiaries. 12 C.F.R. 34.4(a)(1).

2. Respondent Wachovia Bank, N.A. (Wachovia Bank or the Bank), is a national bank chartered by the OCC. Respondent Wachovia Mortgage Company (Wachovia Mortgage), a North Carolina corporation, engages in the business of mortgage lending. In 1987, Wachovia Mortgage became licensed to conduct its business in Connecticut. Pet. App. A5. Connecticut statutes prohibit the conduct of first and secondary mortgage business without a state-issued license; require that licensees make their records available to the Connecticut Banking Commissioner on demand; and authorize the Commissioner to enforce those requirements, including through issuance of cease and desist orders. *Id.* at A5, A38.

On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank. Pet. App. A5. Wachovia Mortgage then surrendered its Connecticut license, in reliance on the principle that state-law limitations on its mortgage lending activities were preempted by virtue of its status as an operating subsidiary of Wachovia Bank. *Id.* at A5-A6.[1] On February 24, 2003, petitioner, the Banking Commissioner of the State of Connecticut, issued a Notice of Intent to Issue a Cease and Desist Order against Wachovia Mortgage for engaging in the business of mortgage lending without a license. On March 31, 2003, Wachovia Mortgage entered into a stipulation with petitioner, pursuant to which

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[1] Subject to certain exceptions, a national bank must obtain approval from the OCC before acquiring or establishing an operating subsidiary. See 12 C.F.R. 5.34(e)(5). In this case, Wachovia Bank had previously received OCC authorization to conduct real estate lending activities through an operating subsidiary, and that existing authorization applied to Wachovia Mortgage. See 12 C.F.R. 5.34(e)(5)(vi).

it agreed to apply for re-licensing while reserving its right to pursue legal action. *Id.* at A5-A6.

3. On April 25, 2003, respondents filed an action in the United States District Court for the District of Connecticut, seeking declaratory relief on the ground that the National Bank Act and the Comptroller's regulations preempt the enforcement of the relevant Connecticut banking laws against Wachovia Mortgage.[2]

a. The district court granted summary judgment in favor of respondents. Pet. App. A36-A58, A63. The court noted that petitioner had conceded that the Act and regulations would preempt application of the relevant Connecticut banking laws to Wachovia Bank. *Id.* at A44. Petitioner argued, however, that those laws could be enforced against the Bank's operating subsidiary, Wachovia Mortgage.

In rejecting that claim, the district court explained that any enforcement of the state banking laws against Wachovia Mortgage "seemingly creates a direct conflict with" 12 C.F.R. 7.4006, under which "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Pet. App. A44. Applying the two-step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court sustained the Comptroller's regulatory determination that an operating subsidiary should be subject to state law only to the same extent as its parent national bank.

With respect to the first step of the *Chevron* analysis, the court explained that Congress had not specifically addressed the extent to which state laws may be applied to an operating

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[2] Respondents also filed a claim for injunctive relief under 42 U.S.C. 1983, asserting that they possessed federal rights under the National Bank Act and that petitioner's actions infringed those rights. The Section 1983 claims were ultimately resolved against respondents, see Pet. App. A28-A34, A61-A63, and those claims are not before this Court.

subsidiary. Pet. App. A47-A52. With respect to the second step, the court concluded that state regulation of activities conducted by national banks through their operating subsidiaries "could reasonably be conceived to have the same obstructive effect on national bank operations as * * * [if] directed at the bank itself." *Id.* at A55.

b. The court of appeals affirmed in pertinent part. Pet. App. A1-A28, A34. Observing that "[f]ederal regulations have no less pre-emptive effect than federal statutes," *id.* at A13 (quoting *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982)), the court explained that petitioner had erroneously "attempt[ed] to frame the issue as whether Congress has expressly and clearly manifested an intent to preempt state visitorial power over operating subsidiaries." *Id.* at A15; see *id.* at A13. The "proper focus" instead, the court observed, "is on whether the agency * * * 'has exceeded [its] statutory authority or acted arbitrarily.'" *Ibid.* (quoting *de la Cuesta*, 458 U.S. at 154). Applying the *Chevron* framework, the court of appeals upheld the relevant regulations.

The court first explained that Congress had not addressed the extent to which state laws may be applied to a national bank's operating subsidiaries. Congress had thus "left open a gap concerning the treatment of * * * operating subsidiaries," and the "OCC has the authority to fill that gap by defining a national bank's incidental powers to include conducting the business of banking * * * through an operating subsidiary." Pet. App. A22.

The court next determined that the Comptroller had acted reasonably in concluding that state laws may be applied to an operating subsidiary only to the extent that those laws would apply to the parent national bank if it engaged in the same activities directly. The court reviewed the Comptroller's longstanding "policy judgment that national banks' use of operating subsidiaries as separately structured corporate

entities is desirable and * * * should not be hindered by state regulations," and concluded that the "OCC's well-explained policy judgment is reasonable and entitled to deference." Pet. App. A23, A24. The court explained that 12 C.F.R. 7.4006 "reflects [the OCC's] policy judgment about national banks' use of operating subsidiaries" by clarifying "that state laws apply to operating subsidiaries to the same extent that they apply to the parent national bank." Pet. App. A25. Wholly apart from 12 C.F.R. 7.4006, moreover, the court concluded that the Comptroller's regulations concerning real estate lending, 12 C.F.R. 34.1(b), 34.4, "independently support a finding of preemption in this case." Pet. App. A27.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with the decisions of any other courts. Indeed, every lower court to consider the question presented has upheld the validity of the Comptroller's regulations governing the applicability of state laws to operating subsidiaries of national banks. Accordingly, the petition should be denied.

A. Every Court To Consider The Question Presented Has Correctly Sustained The Validity Of The Regulations

1. In addition to the court of appeals below, two other courts of appeals have rejected challenges to the Comptroller's regulations establishing that state laws may be enforced against an operating subsidiary only to the extent that those laws may be enforced against the parent national bank. See *Wachovia Bank, N.A.* v. *Watters*, 431 F.3d 556 (6th Cir. 2005), petition for cert. pending, No. 05-1342; *Wells Fargo Bank N.A.* v. *Boutris*, 419 F.3d 949 (9th Cir. 2005). No court has reached a contrary result. In view of the uniformity of the

decisions among the lower courts, there is no reason for this Court to grant certiorari.[3]

2. The courts of appeals that have addressed the issue have correctly upheld the Comptroller's regulations. It is settled that "[f]ederal regulations have no less preemptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153. Moreover, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 154. Rather, a federal regulation has preemptive force whenever (i) the agency intended to preempt the state laws at issue, and (ii) the regulations achieving that result are "within the scope of the [agency's] delegated authority." *Ibid.*; see *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

a. With respect to the threshold question, the OCC's pertinent regulations plainly are intended to preempt the enforcement of state laws against an operating subsidiary. The Comptroller expressly addressed that issue in 12 C.F.R. 7.4006, which establishes that, except as "otherwise provided by Federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Petitioner suggests (Pet. 13-14) that the OCC did not intend for Section 7.4006 to have preemptive effect, but the plain terms of the provision refute that contention. And the courts below, as well as the other courts of appeals that have addressed Section 7.4006, have construed the provision as preemptive, in accordance with its express and unambiguous language. See

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[3] The Fourth Circuit is currently considering the validity of the OCC's relevant regulations in an appeal from a district court decision that upheld those regulations. See *National City Bank* v. *Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005), appeal pending, No. 05-1647. The Second Circuit is currently considering an appeal from a district court decision ruling in favor of the OCC on related issues. *OCC* v. *Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005), appeal pending, No. 05-6001.

Pet. App. A25-A26, A44-A46; *Watters*, 431 F.3d at 559-560, 561, 562; *Boutris*, 419 F.3d at 957, 962-963.[4]

Aside from Section 7.4006, other OCC regulations independently establish that the relevant Connecticut laws may be applied to an operating subsidiary only insofar as those laws may be applied to the parent national bank. For instance, the regulations provide that an operating subsidiary conducts its activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. 5.34(e)(3). An integral aspect of the "terms and conditions" under which a national bank conducts its activities is the extent to which its operations are subject to state laws. See 12 C.F.R. 7.4009(b) ("state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks"). Under Sec-

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[4] In arguing that Section 7.4006, despite its plain terms, is not preemptive, petitioner relies (Pet. 13-14) on the Comptroller's statements concerning whether the regulation would have federalism implications for purposes of Executive Order No. 13,132, 3 C.F.R. 206 (2000). See 66 Fed. Reg. 34,790 (2001). The Comptroller expressed the view that Section 7.4006 did not implicate Executive Order No. 13,132 because existing regulations already established that state laws could be applied against an operating subsidiary only to the extent they applied to the parent national bank. The Comptroller accordingly observed that Section 7.4006 "*itself* does not effect preemption" for purposes of Executive Order No. 13,132. *Ibid.* (emphasis added). That observation was limited to addressing the marginal effect of Section 7.4006 relative to pre-existing law for purposes of the applicability of Executive Order No. 13,132, and does not suggest that the Comptroller understood the import of Section 7.4006 to be something other than the clear preemptive effect set forth in its text. Rather, Section 7.4006 was designed to "clarif[y]" the preemptive effect that was provided, albeit less explicitly, by the existing regulations. 66 Fed. Reg. at 34,788; see *id.* at 34,788-34,789. Lest there be any doubt on that score, the Comptroller went on to explain that, even if Section 7.4006 *did* add to the preemptive scope of the existing regulations, the agency had complied with Executive Order No. 13,132. See *id.* at 34,790.

tion 5.34(e)(3), an operating subsidiary conducts its activities subject to the "same * * * terms and conditions" of state law as the parent national bank. 12 C.F.R. 5.34(e)(3); see *Boutris*, 419 F.3d at 962 (explaining that Section 7.4006 "simply explicate[s] further [the] specification, in" Section 5.34(e)(3), that "operating subsidiaries are to have the *same* authority as, and be subject to the *same* governmental regulation as, their national bank parents").

Finally, as the court of appeals correctly concluded (Pet. App. A26-A27), the OCC's regulations governing real estate lending also establish that state banking laws like those at issue here cannot be enforced against operating subsidiaries that (like Wachovia Mortgage) engage solely in real estate lending activities. Those regulations provide that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. 34.4(a). In particular, "a national bank may make real estate loans * * * without regard to state law limitations concerning," *inter alia*, "[l]icensing" and "registration," 12 C.F.R. 34.4(a)(1), such as the Connecticut licensing requirements that petitioner seeks to enforce in this case. And those regulatory constraints on the application of state laws to a national bank's real estate lending activities explicitly apply to operating subsidiaries as well. See 12 C.F.R. 34.1(b) ("This part applies to national banks *and their operating subsidiaries* as provided in 12 CFR 5.34.") (emphasis added).[5]

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[5] Even if the various OCC regulations did not by their terms preempt the application of state laws to an operating subsidiary to the same extent as with respect to the parent bank, the state laws would be impliedly preempted by virtue of basic principles of conflict preemption. Under those principles, state laws are preempted to the extent they impair the exercise of a national bank's authorized powers, see *Barnett Bank* v. *Nelson*, 517 U.S. 25, 31-34 (1996), including the power to conduct activities through an operating subsidiary.

b. In promulgating the relevant regulations, the Comptroller acted well "within the scope of [his] delegated authority" under the National Bank Act. *de la Cuesta*, 458 U.S. at 154. As the court of appeals recognized, this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), sets forth the proper framework for examining whether the regulations are valid exercises of the Comptroller's delegated authority. See Pet. App. A15-A16; *Watters*, 431 F.3d at 560; *Boutris*, 419 F.3d at 958.[6]

i. This Court has held that the *Chevron* framework is applicable, *inter alia*, when "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001); see *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). It is undisputed that Congress has delegated authority to the Comptroller to promulgate regulations carrying the force of law, see 12 U.S.C. 93a (granting the Comptroller general authority "to prescribe rules and regulations to carry out the responsibilities of the office"), including

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[6] Although *de la Cuesta* predated the decision in *Chevron*, the *de la Cuesta* Court's discussion of the requirement that an agency's preemptive regulation fall within the scope of the agency's delegated authority mirrors the subsequent discussion in *Chevron* of the weight generally to be given an agency interpretation. Compare *de la Cuesta*, 458 U.S. at 153-154, with *Chevron*, 467 U.S. at 843-845. Indeed, the two decisions rely on the same precedents. See *de la Cuesta*, 458 U.S. at 154 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)); *Chevron*, 467 U.S. at 844-845 (also quoting *Shimer*, 367 U.S. at 382-383). And *Chevron* explicitly relied on *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), see *Chevron*, 467 U.S. at 845, which itself had expressly applied *de la Cuesta* in upholding a preemptive regulation, see *Crisp*, 467 U.S. at 699-700. A regulation that satisfies the two-step *Chevron* analysis will necessarily be within the scope of the agency's delegated authority. The *Chevron* framework thus governs the inquiry called for by *de la Cuesta* into whether an agency acted within its delegated authority in promulgating a preemptive regulation.

regulations governing the conduct of real estate lending activities, see 12 U.S.C. 371(a). Indeed, this Court has recognized that the "Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle [of deference] with respect to his deliberative conclusions as to the meaning of these laws." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (citation and internal quotation marks omitted).

It is equally clear that the relevant OCC regulations were promulgated pursuant to the agency's delegated authority to adopt legally binding regulations. Each of the pertinent regulations was adopted pursuant to formal notice-and-comment rulemaking procedures. See 61 Fed. Reg. 60,374-60,377 (1996) (12 C.F.R. 5.34); 66 Fed. Reg. 34,792 (2001) (12 C.F.R. 7.4006); 69 Fed. Reg. 1917 (2004) (12 C.F.R. 34.4); see also *Mead*, 533 U.S. at 229 (formal rulemaking authority is "a very good indicator of delegation meriting *Chevron* treatment"); *id.* at 231 & n.13 (citing *Nationsbank* as establishing that Comptroller's interpretations of National Bank Act warrant deference even when not the product of formal notice-and-comment proceedings). In addition, the plain terms of the regulations confirm that they establish rules carrying the force of law. See 12 C.F.R. 5.34(e), 7.4006, 34.1(a), 34.4.

ii. The threshold question under the *Chevron* framework is whether Congress has spoken directly to the issue addressed by the agency interpretation—here, the extent to which state laws are applicable to an operating subsidiary's activities. Congress, as the court of appeals determined, has not spoken to that issue, and nothing in the National Bank Act casts doubt on the OCC's regulations. Pet. App. A16-A22.

As an initial matter, petitioner correctly concedes that the Comptroller acted well within his authority under the National Bank Act in establishing that national banks may carry

out their authorized activities through an operating subsidiary. See Pet. App. A17 ("[N]either [petitioner] nor the [amici] dispute that the OCC is empowered to authorize national banks to use operating subsidiaries in conducting their business of banking."). This Court has recognized the Comptroller's authority to define the "incidental powers" possessed by national banks under 12 U.S.C. 24 Seventh, see *Nationsbank*, 513 U.S. at 258-260, 264, and the OCC has made clear since 1966 that one such "incidental power" is the authority of a national bank to conduct its authorized activities through an operating subsidiary. See 12 C.F.R. 5.34; 31 Fed. Reg. 11,459 (1966); Pet. App. A10, A19, A23-A24; *Watters*, 431 F.3d at 561-562; *Boutris*, 419 F.3d at 959-960. The operating subsidiary principle is not unique to the OCC or to national banks, but is also reflected in regulations promulgated by the Federal Reserve Board and the Office of Thrift Supervision. See 12 C.F.R. 223.3(w), 250.141(c), 559.3(n)(1).

It is also undisputed that the relevant Connecticut laws are preempted with respect to Wachovia Bank itself (or any national bank). See Pet. App. A55 (petitioner "concedes that the state would have no authority to enforce the statutes against Wachovia Bank itself"). Preemption of state banking regulation of national banks is manifested by, *inter alia*: (i) the specification in the visitorial powers statute and regulations that visitorial powers are to be exercised by the OCC alone, to the exclusion of state officials, 12 U.S.C. 484; 12 C.F.R. 7.4000(a); (ii) the prescription in the regulations that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks," 12 C.F.R. 34.4(a); and (iii) the specific regulation that bars application of state licensing and registration laws to national banks, 12 C.F.R. 34.4(a)(1). See also 12 C.F.R. 7.4009(d).

In light of the unchallenged preemption of state laws with respect to a parent national bank, and the undisputed authority of a national bank to conduct its banking functions through an operating subsidiary, it follows that the Comptroller has authority to preempt the application of state laws to an operating subsidiary to the same extent that those laws would be preempted with respect to the parent national bank. As the Ninth Circuit explained in *Boutris*, "once the OCC's authority to allow the creation of and to regulate operating subsidiaries as it has done is established, its authority to displace contrary state regulation where the Bank Act itself preempts contrary state regulation of national banks follows." 419 F.3d at 962; accord *Watters*, 431 F.3d at 561-562.

The court of appeals correctly rejected petitioner's argument (Pet. 23-25) that Congress, in the terms of the visitorial powers statute, 12 U.S.C. 484(a), explicitly barred the OCC from extending the preemption of state visitorial authority to an operating subsidiary. See Pet. App. A16-A17; accord *Watters*, 431 F.3d at 561. Petitioner notes that Section 484(a) by its terms bars only the application of state visitorial powers to a "national bank,"[7] and infers that OCC therefore lacks authority to preempt state regulation of operating subsidiaries. But the reference to a "national bank" in Section 484(a) hardly compels the conclusion that state regulators must be permitted to regulate the business of national banking whenever, and to the extent that, national banks choose to exercise their federal right to perform banking functions through operating subsidiaries. Nothing in the text of the statute precludes the entirely reasonable conclusion that state regulators

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[7] "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a).

should be barred from exercising visitorial powers over operating subsidiaries in order to preserve the exclusively federal regulatory regime that Congress plainly intended to achieve.

Section 484(a) was enacted in 1864 as part of the original National Bank Act, and has remained materially unchanged since that time. See Act of June 3, 1864, ch. 106, § 54, 13 Stat. 116; *Boutris*, 419 F.3d at 963 & n.18. It was not until many decades later that the OCC first recognized the authority of national banks to conduct their activities through an operating subsidiary. See Pet. App. A19. The reference to a "national bank" in Section 484(a) thus could not have been intended to foreclose the OCC from applying Section 484(a)'s protections to a national bank's "operating subsidiary," a concept that did not exist when Section 484(a) was enacted.

Moreover, in establishing that state laws—including the exercise of state visitorial powers—may be applied to an operating subsidiary only to the same extent as to the parent national bank, the OCC did not purport to interpret the term "national bank" in Section 484(a) to include an operating subsidiary. See Pet. App. A17. Rather, the OCC construed the term "incidental powers," in 12 U.S.C. 24 Seventh, to encompass the conduct of activities through an operating subsidiary. A straightforward incident of authorizing a national bank to conduct its activities through an operating subsidiary is that the subsidiary should no more be constrained by state law (including state laws concerning visitation) than the parent bank. Accordingly, Section 24 Seventh, coupled with Section 484(a), "provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers." Pet. App. A17.[8]

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[8] Petitioner suggests (Pet. 24-25) that the OCC lacks exclusive visitorial authority over operating subsidiaries because an operating subsidiary is an "affiliate" of a national bank for purposes of 12 U.S.C. 481, and the OCC lacks

iii. The final question under *Chevron* is whether the challenged agency interpretation reflects a reasonable construction of the governing statute. See *Chevron*, 467 U.S. at 844-845; *de la Cuesta*, 458 U.S. at 153-154. The Comptroller's regulations readily satisfy that requirement.

As the OCC has explained, "the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations." 61 Fed. Reg. 60,354 (1996); see Pet. App. A23-A24. Contrary to petitioner's argument (Pet. 27-29), the OCC's rationale does not impermissibly disregard principles of corporate separateness. Rather, the OCC has reasonably concluded that an operating subsidiary affords "a convenient and useful corporate form for conducting activities that the parent bank could conduct directly." 66 Fed. Reg. at 34,788; see *Boutris*, 419 F.3d at 960 ("Allowing national banks to create, control, and delegate banking functions to operating subsidiaries provides some assistance to banks in performing their authorized activities.").

The determination that it is desirable to afford national banks the authority to conduct banking activities through an operating subsidiary bears a "close and logical" connection to the determination that state laws are preempted with respect

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exclusive visitorial authority over "affiliate[s]." That argument lacks merit. As the court of appeals explained, the term "affiliate" encompasses a much broader category of affiliated entities than merely operating subsidiaries: an operating subsidiary by definition may engage only in the business of banking as authorized by the National Bank Act, whereas an affiliate may engage in non-banking functions. Pet. App. A18-A19; see *id.* at A50-A51. At any rate, even if an operating subsidiary were properly considered an "affiliate" for purposes of 12 U.S.C. 481, that provision simply does not speak to the extent to which state laws (including state visitorial powers) may be enforced with respect to an operating subsidiary. See Pet. App. A21.

to an operating subsidiary to the same extent as with respect to the parent national bank. *Boutris*, 419 F.3d at 962; see Pet. App. A23. In fact, Congress implicitly ratified that result in 1999 when it enacted 12 U.S.C. 24a(g)(3) as part of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 121, 113 Stat. 1378; see Pet. App. A19-A20. That provision confirms Congress's understanding of the authority of national banks to control operating subsidiaries, *i.e.*, subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted *subject to the same terms and conditions that govern the conduct of such activities by national banks*." 12 U.S.C. 24a(g)(3)(A) (emphasis added); see Pet. App. A19-A20; *Boutris*, 419 F.3d at 957 & n.9; 66 Fed. Reg. at 34,788. By recognizing that an operating subsidiary conducts its activities "subject to the same terms and conditions" as the parent national bank itself, 12 U.S.C. 24a(g)(3)(A), Congress reinforced the conclusion that an operating subsidiary should be subject to the "same terms and conditions" of state law as the parent national bank.

By contrast, subjecting an operating subsidiary to state regulations that could not be applied to the parent national bank would impair a national bank's exercise of its long-settled power under the National Bank Act to conduct its banking functions through an operating subsidiary. See Pet. App. A23-A24, A25. National banks would have to choose between the benefits of maintaining an operating subsidiary and the benefits of avoiding burdensome state regulations in a manner that would skew decision-making and potentially deter national banks from realizing the efficiencies that an operating subsidiary can provide. Accordingly, as the court of appeals determined, the OCC's "well-explained policy judgment" that an operating subsidiary is subject to state laws to the same extent as its parent national bank "is reasonable and entitled to deference." *Id.* at A24.

B. Petitioner's Claim That Courts Should Not Defer To Preemptive Regulations Does Not Merit Review

The first question set forth in the petition asks whether "the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act [is] entitled to judicial deference." Pet. i. According to petitioner, the decision of the court of appeals, which applies *Chevron* deference in judging the validity of the Comptroller's regulations, conflicts with decisions of other circuits that reject judicial deference to agencies' preemption decisions. Insofar as petitioner objects to the application of *Chevron* principles to the preemption issue in this case, he has forfeited any such argument: as the court of appeals noted, "[n]either party has questioned that the *Chevron* framework generally applies in this case." Pet. App. A15 n.6; see also Pet. C.A. Br. 29-35. In any event, petitioner errs both in his characterization of the decision below and in his assertion of a circuit conflict. Further review is not warranted.

1. Petitioner contends that the court of appeals should have "decid[ed] for itself whether Congress had intended to oust state regulation," Pet. 11, but instead impermissibly deferred to the OCC's views on whether the application of the pertinent Connecticut banking laws to an operating subsidiary is preempted by federal law. Pet. 9-15. Petitioner is mistaken. As this Court has explained, when an agency, as here, "promulgates regulations intended to pre-empt state law," a "narrow focus on Congress' intent to supersede state law [is] misdirected." *de la Cuesta*, 458 U.S. at 154. The validity of an agency's preemptive regulation therefore does not depend on "congressional authorization to displace state law," but instead turns on whether the preemptive intent of the agency is clear and whether the regulation "is within the scope of the [agency's] delegated authority." *Ibid.* The court

of appeals, adhering to *de la Cuesta*, correctly rejected petitioner's argument that the analysis should focus on whether Congress had manifested an intention to preempt state regulation of operating subsidiaries. Pet. App. A14-A15.

Nor did the court of appeals defer to the OCC's views concerning the question of "*whether* a statute is pre-emptive." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996); cf. Pet. 12. There is no dispute that the National Bank Act has preemptive effect. See 12 U.S.C. 484(a). The question rather is the substantive scope of the "business of banking" conducted by national banks, 12 U.S.C. 24 Seventh, over which the OCC exercises exclusive visitorial authority. The court of appeals properly gave *Chevron* deference to the Comptroller's reasonable "policy judgment" that "national banks should be able to 'use the operating subsidiary as a convenient and useful corporate form for conducting activities' without substantial restrictions imposed by states." Pet. App. A25; see *de la Cuesta*, 458 U.S. at 154, 159-170.[9]

2. There is no merit to petitioner's assertion (Pet. 11) that the decision below conflicts with *BankWest, Inc.* v. *Baker*, 411 F.3d 1289 (11th Cir.), vacated and rehearing en banc granted, 433 F.3d 1344 (2005). That decision has been vacated and therefore lacks precedential effect. *County of Los Angeles* v.

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[9] The court did not expressly defer to the Comptroller in concluding that the regulations were generally within the scope of the Comptroller's delegated authority. See Pet. App. A21-A22. Instead, the court independently concluded "that the OCC generally has the authority to promulgate the regulations at issue." *Id.* at A22. Having reached that conclusion, the court next explained that it would "defer to the regulations if they reflect a reasonable construction of the statutory scheme." *Ibid.* In any event, the scope-of-authority question need not be addressed independently of the *Chevron* analysis because a regulation that is valid under *Chevron* will necessarily be within the scope of the agency's regulatory authority, and a regulation that is invalid under *Chevron* will lack the force of law regardless of whether the regulation could be said, in some sense, to fall within the scope of the agency's delegated authority.

Davis, 440 U.S. 625, 634 n.6 (1979). In any event, *BankWest* involved the question whether deference is owed to an agency's informal view that state law is preempted by a federal *statute*. See 411 F.3d at 1300-1301. In this case, the court of appeals had no occasion to address that question, but instead held that the Connecticut laws at issue were preempted by the OCC's implementing regulations.

Nor does the decision below conflict (Pet. 11) with *Colorado Public Utilities Commission* v. *Harmon*, 951 F.2d 1571 (10th Cir. 1991). In that case, the court "defer[red] to [the agency's] determinations that its regulations overlap with [the state's] regulations," but "independently review[ed] the legal issue" of whether the "overlap" was sufficient to trigger a finding of implied conflict preemption. See *id.* at 1579. Whatever the merit of the *Harmon* court's approach with respect to the application of deference principles in the context of implied conflict preemption, the approach has no relevance here. There is no dispute that application of the relevant Connecticut banking laws to Wachovia Mortgage would conflict directly with the Comptroller's regulations, and the court of appeals did not rely on deference principles in reaching that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-431

In The

Supreme Court of the United States

October Term, 2005

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,
Petitioner,
v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Petition For Writ of Certiorari To the United States Court of Appeals for the Second Circuit

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BRIEF OF THE STATES OF FLORIDA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE. NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND PUERTO RICO, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act entitled to judicial deference?

2. Do the provisions of the National Bank Act and the regulations promulgated thereunder by the Office of Comptroller of the Currency preempt state law licensing and regulatory authority over state-chartered operating subsidiaries of national banks?

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INTEREST OF *AMICI CURIAE*

The States have a compelling interest in the enforcement of laws designed to protect consumers by ensuring that state-chartered mortgage lenders and other providers of financial services do not engage in unscrupulous practices. Respect for both that interest and for principles of federalism compels the conclusion that a self-interested federal agency may not decide by bureaucratic fiat the proper balance of power between the federal government and the States. In holding that a rule promulgated by the Office of the Comptroller of the Currency ("OCC") extending the scope of the OCC's own preemptive authority was nevertheless entitled to deference, the Second Circuit decision not only conflicts with the holdings of other circuit courts, but also threatens to upset the proper federal-state balance and eliminate the States' ability to police dishonorable lenders. Moreover, the Second Circuit's acquiescence to the OCC's expansion of federal preemption to include *state-chartered* subsidiaries of national banks removes *state-chartered* entities from state oversight solely because of their affiliation with national banks. Left untouched, the Second Circuit's decision tenders sole responsibility for consumer protection to the OCC, an agency lacking the resources and the Congressionally-delegated authority to undertake the role currently played by the States. The States thus have a compelling interest in this Court's granting review.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit redefined the scope of deference given to agency regulations.

Permitting administrative agencies to determine the scope of their own preemptive authority -- and affording deference to those determinations -- departs substantially from precedent and eliminates an essential check on the powers of administrative agencies. Since "a preemption determination involves matters of law -- an area more within the expertise of the courts" than within the expertise of an administrative agency, *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991), case law determining the preemptive effect of agency regulations, particularly in the banking arena, is abundant. This precedent is properly reviewed and applied by courts, not administrative agencies. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (recognizing that courts are "the supposed experts in analyzing judicial decisions").

The Second Circuit for the first time applied the deferential standard of review of *Chevron U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to a federal agency's determination as to the preemptive effect of its own regulations. Instead of considering for itself whether Congress intended for state law to be preempted in this case, the Second Circuit erroneously deferred to the OCC's own conclusions regarding the preemptive effect of its regulations. By the OCC's own admission, 12 C.F.R. § 7.4006 does not reflect any substantive conclusions of the OCC regarding the scope of the National Bank Act. Rather, it merely reflects the OCC's guess at how a federal court would likely construe the scope of its preemptive authority. *See* Bank Activities and Operations, 66 Fed. Reg. 34784, 34790 ("The section itself does not effect preemption of any State law; it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent."). Thus, the Second Circuit afforded

deference to the OCC's guess at the conclusion the court itself would reach, turning the OCC's predictions into a self-fulfilling prophecy.

Although agency regulations may have preemptive effect, *Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 152-53 (1982), prior to the Second Circuit's decision, no court had ever held an agency may itself determine the preemptive effect of its own regulations. "[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987); *see also* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1009 (1999) ("[A]gencies have no comparative advantage in reading statutes, and . . . agency self-interest may cloud its judgment"); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) ("Government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission.").

The Comptroller of the Currency himself acknowledged in 2002, that "the OCC has no self-executing power to preempt state law." *See* Press Release, Office of the Comptroller of the Currency, *Comptroller Calls Preemption a Major Advantage of National Bank Charter* (Feb. 12, 2002), http://www.occ.treas.gov/ftp/release/2002-10.doc. Section 7.4006 constitutes an abrupt and substantial departure from this acknowledgement. Thus the OCC's rules "may represent an unprecedented expansion of Federal preemption authority" which "comes without congressional authorization, and without a corresponding increase in budget resources for the agency." Staff of H. Comm. on Fin. Servs., 108th Cong., *Report on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005* (Comm. Print 2004) at 15; *see also* 150 Cong. Rec. E692 (daily ed. Apr. 28, 2004) (statement of Rep. Paul) ("This new OCC authority will have far-reaching and unintended consequences. State law governing mortgage brokers, sub-prime lenders, check cashing centers, leasing

companies, and even car dealers could be preempted under the new proposal."); Statement of Congressman Luis Gutierrez, OCC preemption hearing (April 1, 2004), http://financialservices.house.gov/media/pdf/040104lg.pdf ("I think it is clear that we will never agree with the OCC regarding the authority it purports to have."); Report, Democratic Staff of the House Financial Services Committee, *Key Problems with the OCC's Preemption Rule*, http://www.house.gov/banking_democrats/OCC0317.html ("The OCC has inappropriately applied its preemption standard to exempt from state laws, state-chartered operating subsidiaries of national banks. Even if national banks are exempt from certain state laws, there is no reason – or basis in federal law – to extend that preemption to state-chartered operating subsidiaries.").

II. The Second Circuit's decision conflicts with decisions of the Tenth and Eleventh circuits.

In stark contrast to the Second Circuit, the Eleventh Circuit has stated "we do not defer to agency positions, whether formal or informal, on preemption issues." *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1300 (11th Cir. 2005). Likewise, the Tenth Circuit refused to give deference to an agency's position on preemption, noting a preemption determination involves matters of law -- an area more within the expertise of the courts than an administrative agency. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571,1579 (10th Cir. 1991); *see also Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) ("We are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle.").

In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), this Court recognized the difference between agency interpretations as to the substantive meaning of a statute and interpretations as to the preemptive effect of a statute. *Id.* at 744. "We may assume (without deciding) that the latter question must

always be decided de novo by the courts." *Id.* The question now warrants immediate attention in light of the conflict created by the Second Circuit's decision, and its tremendous importance to the States.

III. The OCC's interest is at odds with the States.

Affording deference to an agency's conclusions regarding the preemptive effect of its own regulations is particularly distressing where the interests of the agency are at odds with those of the States. Indeed, "[i]t would exceed the bounds of fair play to allow an institutionally self-interested advocacy position, which may properly carry a bias, to control the judicial outcome." *See* Robert A. Anthony, "*Which Agency Interpretations Should Bind Citizens and the Courts?*" 7 Yale J. on Reg. 1, 60-61 (1990); *see also Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1428 (D.C. Cir. 1985) ("To carry much weight, [an agency's] interpretation must be publicly articulated at some time prior to the embroilment of the agency in litigation over the disputed provision.").

The OCC's operations are funded by the same national banks that receive the benefit of its preemptive rulings. "[T]he constituency positively affected by the OCC's position is concentrated, organized and well-funded, and also happens to be the regulated industry." *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488, 494 (5th Cir. 2003). By contrast, "the constituency which is adversely affected by the decision, though vast, is diffuse, unorganized, and definitionally ill-funded." *Id.* Accordingly, "[i]t may be that these competing interests could better be balanced . . . by a national Congress whose commitments are diverse and universal, or even by the people as they are represented in the state legislatures, than by a solitary institution whose focus is a single industry." *Id.* Given this demonstrable self-interest, affording *Chevron* deference to decisions of the OCC or any federal agency so situated, on the

issue of preemption is as contrary to the public welfare as it is legally flawed.

IV. Untoward expansion of OCC preemption erodes the States' regulation of state-chartered corporations, threatens the dual banking system and undermines state consumer protection laws.

The Second Circuit's decision ratifies the OCC's attempts to convert state-chartered corporations into creatures of federal law without permission of the chartering States. Left unchecked, this could motivate financial institutions to give up their state charters and either obtain a federal charter or merge with a national bank, effectively destroying the dual banking system valued by both Congress and the States.[1]

States have always exercised comprehensive supervision over the corporations they charter and have licensed and regulated corporations chartered by other States transacting business within their borders. "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations . . ." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). The Second Circuit ignored the States' unquestioned primacy in regulating state-chartered corporations and unlawfully invaded sovereign interests protected by the Tenth Amendment by attempting to transform state-chartered corporations into creatures of federal law without the chartering States' permission. This Court held in *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), that a federal statute violated the Tenth Amendment by allowing state-chartered savings institutions to convert to federal charters without state permission. "How [these institutions] shall

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[1] A number of "state-licensed businesses are now considering becoming operating subsidiaries of national banks in order to exempt themselves from state laws." *See Review of the National Bank Preemption Rules Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. (2004) (statement of Gavin M. Gee, Director of Finance, State of Idaho), at 5.

be formed, *how maintained and supervised*, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred." *Id.* at 337 (emphasis added). *See also Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp.*, 302 U.S. 120, 127 (1937) (holding that § 77B of the federal Bankruptcy Act did not allow shareholders to file a bankruptcy petition on behalf of a corporation whose charter had expired under state law, because any such filing would be "an intrusion by the Federal Government on the powers of the [chartering] State").

That the state-chartered corporations at issue are operating subsidiaries of national banks does not negate the authority of the state. "For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly." S. Rpt. No. 106-44 at 8 (1999). These operating subsidiaries are not themselves national banks with national charters. Rather, they are state created entities incorporated under state law. The OCC has not questioned previously the authority of States to regulate, license, and examine these state-chartered corporations. Thus, the OCC's recent attempts to preempt state authority constitute a dramatic departure from its historical view of state licensing and regulation.[2]

In an area where, as here, state law traditionally has applied, Congressional intent to preempt state law must be clearly manifested. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). But Congress has *not* authorized the OCC to disregard

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[2] Even where deference may properly be applied to agency determinations, this Court has refused to do so where agencies have shifted from their own historical views. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000) ("Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.").

the separate corporate existence of national banks and their operating subsidiaries. The National Bank Act provides absolutely no basis for ignoring the fundamental corporate distinctions between a national bank parent and its subsidiary. In fact, federal statutes draw a sharp distinction between "national banks," on the one hand, and their "subsidiaries" and "affiliates" on the other. The "incidental powers" granted by 12 U.S.C. § 24 Seventh, the real estate lending powers provided in 12 U.S.C. § 371, and the limitations on "visitorial powers" under 12 U.S.C. § 484, apply only to "national banks." A "national bank" is an institution that (i) has filed articles of association and an organization certificate with the OCC, pursuant to 12 U.S.C. §§ 21-24 & 26; (ii) has received a certificate of authority from the OCC to carry on a "banking business" under 12 U.S.C. §§ 24 & 27; and (iii) is entitled to become a member of the Federal Reserve System under 12 U.S.C. §§ 282 & 287. Operating subsidiaries, on the other hand, are chartered as nonbank corporations under state law, do not receive certificates of authority to carry on a "banking business," and cannot become members of the Federal Reserve System. Accordingly, the preemptive authority the OCC possesses with respect to national banks under Sections 24 Seventh, 371 and 484 cannot be simply extended to include operating subsidiaries.

The legal separation between a subsidiary and its parent corporation is a "general principle of corporate law deeply ingrained in our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citation and internal quotation marks omitted). Federal courts have consistently interpreted federal statutes in a manner that upholds corporate separation and other longstanding principles of state corporate law, absent clear evidence that Congress intended a different result. *See, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 475-76 (2003) (refusing to conclude that, "as a categorical matter, all subsidiaries are deemed to be the same as the parent corporation," because "[t]he text of the [relevant statute] gives no indication that Congress intended us to depart from the

general rules regarding corporate formalities"); *Bestfoods*, 524 U.S. at 62 (rejecting a proposed reading of a pollution control statute ("CERCLA") that would impose automatic liability on a parent corporation for the acts of its subsidiary, because "nothing in CERCLA purports to reject this bedrock principle [of corporate separation], and against this venerable common law backdrop, the congressional silence is audible"); *CTS Corp.*, 481 U.S. at 85, 86 (refusing to construe a federal statute to "pre-empt a variety of state corporate laws of hitherto unquestioned validity," because the "longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all [such] state laws . . . it would have said so explicitly").

As the OCC has itself recognized, "the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations." Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996); *Wachovia Bank v. Burke*, 414 F.3d 305, 319 (2d Cir. 2005) ("[T]he OCC has long maintained that an operating subsidiary is legally distinct from the parent bank."). Allowing national banks to secure the legal benefits of operating through a subsidiary while still enjoying the benefits of having a national charter finds no basis in the National Bank Act. *See* Report, Democratic Staff of the House Financial Services Committee, *Key Problems with the OCC's Preemption Rule*, http://www.house.gov/banking_democrats/OCC0317.html ("If a national bank wishes to engage in activity and benefit from national bank preemptions, it can perform the activity in the national bank. However, if it wishes [to] minimize corporate liability by establishing a separate state-chartered operating subsidiary, that entity must be subject to state law and enforcement. Otherwise, the OCC is allowing national banks to 'have their cake and eat it too.'").

Finally, the OCC was not designed to function as a consumer protection agency and lacks the resources to effectively police the conduct of all national banks and their state-chartered subsidiaries. For as long as national banks have controlled state-chartered operating subsidiaries, the States have enforced, with the approval of Congress, laws designed to protect consumers against predatory lending and other unscrupulous lending practices. The House Financial Services Committee questioned whether the OCC has sufficient administrative resources to investigate all consumer complaints for 2,150 national banks -- from a single customer assistance center -- let alone investigating all operating subsidiaries of national banks. The OCC's new rules "necessitate that the OCC investigate all consumer complaints for 2150 national banks in the 50 states from a single customer assistance center which only takes calls from 9:00 am to 4:00 pm, on four days each week, excluding federal holidays. There are currently only 40 full time staff members allocated for these tasks at the OCC." Staff of H. Comm. on Fin. Servs., 108th Cong., *Report on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005* (Comm. Print 2004), at 16. The OCC's list of operating subsidiaries of national banks, which includes such state chartered institutions as CashZone Check Cashing Corp., CitiCapital Trailer Rental, Inc., Southern Courier Service, Systems & Services Technologies, Inc, demonstrates the tremendous scope of activities the OCC is attempting to shelter from state regulation. Office of Comptroller of Currency, *Annual Report of National Bank Operating Subsidiaries That Do Business Directly With Consumers* (2005), http://www.occ.treas.gov/consumer/Final%20Op%20Sub%20Version%20for%20PDF_4_08.pdf. These state-chartered corporations have long been subject to state licensing and regulation. Given the OCC's demonstrably inadequate resources, the Second Circuit's decision will undermine consumer protection in the banking context.

By contrast, "state banking agencies and state attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance."[3] Staff of H. Comm. on Fin. Servs., 108th Cong., *Report on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005* (Comm. Print 2004), at 16. In the area of abusive mortgage lending practices alone, state bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions. *Id.* Unlike the OCC, the States have the resources to monitor and enforce consumer law compliance.

[3] The extent to which States may bring actions against national banks to enforce consumer protection laws is an issue currently pending before other courts and is not an issue in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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